

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

KLEEN PRODUCTS, LLC, et al.,	}	Docket No. 10 C 5711
Plaintiffs,		
vs.		
PACKAGING CORPORATION OF AMERICA,		
et al.,		
Defendants.	}	Chicago, Illinois August 9, 2012 10:00 o'clock a.m.

TRANSCRIPT OF PROCEEDINGS - TELEPHONE CONFERENCE
BEFORE THE HONORABLE MAGISTRATE JUDGE NAN R. NOLAN

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02:40:08 1 (The following proceedings were had in open court:)

02:40:08 2 THE COURT: Hi, everyone. We are on the telephone in
02:40:10 3 the courtroom. I know you just gave all of your names to
02:40:14 4 Carolyn. Particularly here, since we don't have video, since
02:40:28 5 you are not like our prisoners with video conferencing, you
02:40:32 6 are going to have to say your name before you speak.

02:40:36 7 So Carolyn has a roll call. I think there are 22
02:40:38 8 people, right, on the phone, something like that. And this is
02:40:44 9 a referral from Judge Shadur. We are having this telephone
02:40:46 10 status based upon two orders that we entered on July 18th and
02:40:54 11 July 26th. It's to touch base and see if some of our motions
02:41:02 12 are on track and to get reports on your meet and confer.

02:41:08 13 Okay. So the first one is, plaintiffs, we received
02:41:14 14 your motion regarding temporal scope, and are we going to
02:41:22 15 receive the defendants' tomorrow?

02:41:28 16 Who is speaking for the defendant? Let me just ask
02:41:30 17 that. Who is speaking for the defendants?

02:41:34 18 MR. McCAREINS: Judge, it's Mark McCareins. I am not
02:41:38 19 -- because I am at an airport, so I am going to be on mute for
02:41:40 20 most of the time. I am going to be more silent than normal,
02:41:44 21 so that explains it.

02:41:44 22 THE COURT: Okay.

02:41:44 23 MR. McCAREINS: I have a flight to catch in 45
02:41:46 24 minutes, so my partner, Mike Mayer, will pick up if you go
02:41:52 25 that far. It's not going to be me taking the lead today.

02:41:52 1 THE COURT: Okay.

02:41:52 2 MS. MILLER: Your Honor, this is Britt Miller,
02:41:56 3 counsel for Temple-Inland.

02:41:56 4 THE COURT: Yes.

02:41:58 5 MS. MILLER: On this particular issue, I can speak.
02:42:00 6 Yes, we will be filing tomorrow per your Honor's schedule. I
02:42:04 7 have one -- on that same point, I have one administrative
02:42:06 8 matter, and that is we -- like plaintiffs, we will be seeking
02:42:12 9 to file our response to the -- responses to the two motions
02:42:16 10 under seal. I am happy to do the paperwork and file the
02:42:18 11 motion. I am also happy to save your Honor the paperwork if
02:42:22 12 your Honor is inclined to simply enter a minute order
02:42:26 13 indicating that we have permission to file under seal.

02:42:28 14 THE COURT: Yes. And I am glad you said that. I
02:42:30 15 received the plaintiffs' motion today, and we will grant their
02:42:36 16 motion, and we will grant your motion to file it under seal.

02:42:40 17 MS. MILLER: So I do not need to file the paperwork
02:42:42 18 then, your Honor?

02:42:44 19 THE COURT: Plaintiffs, does she need to file a
02:42:46 20 separate motion?

02:42:48 21 MR. WOZNIAK: This is Robert Wozniak. We did only
02:42:54 22 because that's how Chris had instructed us to proceed last
02:42:56 23 time. I personally don't have a problem. If you prefer not
02:43:00 24 to receive the paper and just enter the order, that's fine
02:43:04 25 with me.

02:43:04 1 THE COURT: Hold on one minute. Lynette, we can't
02:43:04 2 have an order for all of these. They have to file a separate
02:43:14 3 motion for each?

02:43:14 4 THE CLERK: Yes, they have to file one under seal,
02:43:16 5 and then there is the public version, the redacted version.

02:43:16 6 THE COURT: No, they know that, but do they need a
02:43:24 7 separate motion?

02:43:24 8 THE CLERK: No.

02:43:26 9 THE COURT: Ms. Miller, we don't need a separate
02:43:28 10 motion, but, obviously, we need separate pleadings. And this
02:43:32 11 docket could become very heavy. I think that if we have an
02:43:36 12 agreement going forward, since this is really our first motion
02:43:44 13 in nine months, that we will make a finding of the need for it
02:43:50 14 that there may be proprietary information contained, then I
02:44:00 15 don't think you have to file a separate motion. If I find out
02:44:02 16 you do, I will let you know, but I don't think we need a
02:44:04 17 separate motion if we have an agreement that that's how we are
02:44:08 18 going to be treating this.

02:44:10 19 MS. MILLER: Thank you, your Honor. Then we will
02:44:12 20 file under seal and we will file a public redacted version.

02:44:16 21 THE COURT: Okay. And the same thing for the
02:44:16 22 plaintiffs.

02:44:18 23 MR. MOGIN: Very good, your Honor.

02:44:20 24 THE COURT: On the temporal scope, this is a motion
02:44:24 25 that we also have a reply is due. We anticipated when we sent

02:44:30 1 this that that motion would just be done on the papers, and
02:44:36 2 that reply is due August 24th. Do you think you're going to
02:44:42 3 be able to make that? This is just kind of a status check.
02:44:44 4 As you are right now, do you think you will be able to make
02:44:48 5 that deadline?

02:44:50 6 MR. MOGIN: Your Honor, Dan Mogin speaking. I think
02:44:54 7 there is a slight bit of -- at least on my part, I had thought
02:44:58 8 that what we were going to do was after the defendant filed
02:45:04 9 their motion because it was likely to be heavily factual in
02:45:12 10 terms of their documentation of --

02:45:14 11 THE COURT: You're kind of going in and out, Dan, a
02:45:18 12 little bit.

02:45:18 13 MR. MOGIN: Let me change phones a little bit.

02:45:22 14 THE COURT: Good.

02:45:22 15 MR. MOGIN: I will try and be better.

02:45:24 16 THE COURT: Okay. Thank you.

02:45:30 17 MR. MOGIN: Is this better, your Honor?

02:45:32 18 THE COURT: Yes, much better. Thank you.

02:45:34 19 MR. MOGIN: What I was trying to say is my
02:45:36 20 recollection is that when we discussed the temporal scope
02:45:40 21 motion, that it was anticipated that the defendant's motions
02:45:44 22 would be particularly -- their oppositions, rather, would be
02:45:48 23 particularly factual because they were going to curtail their
02:45:52 24 claims of burden.

02:45:54 25 THE COURT: Right.

02:45:54 1 MR. MOGIN: And that while we had scheduled in I
02:45:56 2 think it was the 24th as a sort of hold-the-date --

02:46:02 3 THE COURT: Right.

02:46:02 4 MR. MOGIN: -- situation, that the plan was actually
02:46:06 5 that the plaintiffs would have some time to review the motion,
02:46:08 6 and then we would report to the court and advise whatever
02:46:12 7 schedule was necessary at that time.

02:46:16 8 THE COURT: Okay. You know, having reviewed your
02:46:24 9 motion, it is really going to require seven very specific or
02:46:28 10 some kind of very specific responses. So that's fine with me.

02:46:34 11 We do have down August 24th for reply, but I am
02:46:40 12 certainly -- I want to see what we get tomorrow, and then we
02:46:44 13 will probably know a little bit more after that.

02:46:46 14 MS. MILLER: Typically, your Honor -- again, this is
02:46:50 15 Britt Miller for Temple-Inland -- defendants will be filing a
02:46:54 16 combined response. We didn't -- as well as there will be some
02:47:00 17 attachments to that that go to specific issues as to each
02:47:04 18 defendant, but we will be filing it as one submission.

02:47:08 19 THE COURT: Okay. That's good.

02:47:10 20 MS. MILLER: The main brief will -- we don't expect
02:47:16 21 will exceed the page limits that are in place, but obviously
02:47:18 22 there will be small submissions specific to each defendant
02:47:22 23 that are attached. We want to make sure that you don't have
02:47:26 24 an objection and we need to file a motion for a formal
02:47:28 25 extension of page limits. We are happy to do so, but the main

02:47:32 1 submission will not exceed the page limit.

02:47:34 2 THE COURT: Okay. That's good to hear.

02:47:38 3 All right. So, Mr. Mogin, we will work with you on
02:47:40 4 that. Let's see what we get tomorrow. Okay? I actually
02:47:46 5 didn't need -- even though you are going to be off in a much
02:47:52 6 more wonderful place, we may need another telephone status
02:47:54 7 anyway. So let's not worry about that right now. We have
02:47:58 8 plenty of other things to worry about.

02:48:00 9 Okay. So that was our -- that is the -- all right.
02:48:12 10 Then that's one motion. Then the second motion is plaintiffs'
02:48:18 11 motion to compel documents, to produce documents and data from
02:48:26 12 all -- oh, no, I'm sorry. Yeah, to produce documents from all
02:48:30 13 reasonably accessible sources. And on that, we are also
02:48:38 14 getting tomorrow, correct, your response to that?

02:48:44 15 MS. MILLER: Your Honor, this is Britt Miller for
02:48:46 16 Temple-Inland again. When I spoke a moment ago and said a
02:48:50 17 combined response, it will be responsive to -- defendants'
02:48:54 18 response will be responsive to both.

02:48:56 19 THE COURT: Oh, to both.

02:48:58 20 MS. MILLER: For time period and data sources will be
02:49:02 21 addressed in the same submission.

02:49:04 22 THE COURT: Right. And the temporal scope is
02:49:06 23 obviously -- that's not as -- we don't think it's as factually
02:49:12 24 separate. Okay.

02:49:16 25 And on the reasonably accessible sources, this is

02:49:22 1 what we have set the status for because I think probably
02:49:28 2 pretty wisely, we have set at the moment an in-person status
02:49:34 3 on August 29th, correct? And Mr. Mogin would be back by then?

02:49:42 4 MR. MOGIN: He would be, your Honor, extremely
02:49:48 5 jet-lagged. I will bring you a coconut or a lei.

02:49:52 6 THE COURT: Right. And on August 29th, if we needed
02:49:56 7 either more information or specifics or Chris and I are trying
02:50:02 8 to plow through and figure out what goes to what person or
02:50:06 9 what defendant, but we are not going to be able to tell that
02:50:12 10 until we get our hands on the response, which is why I'm also
02:50:18 11 saying we might have to have a -- if we are going to have any
02:50:22 12 kind of either argument on the 29th, if we are going to have
02:50:26 13 more detail on the 29th, I'd like to be able to tell you what
02:50:30 14 we need.

02:50:32 15 So until I see what the response is, I think --
02:50:40 16 because we had the status the day before these items are due,
02:50:46 17 which wasn't the best planning on my part, I am kind of
02:50:52 18 talking without having all the facts.

02:50:56 19 All right. So those are the only two that we have
02:51:00 20 briefing on.

02:51:02 21 Then we have five or six issues that parties are
02:51:06 22 still working on meet and confers on, and you were going to
02:51:12 23 let me know if you think the meet-and-confer process is
02:51:18 24 working and therefore not set the briefing or if, in fact, we
02:51:24 25 have to resort to briefing on any of these issues.

02:51:30 1 So, number one, I've got down, and not in any
02:51:36 2 particular order, but I just happen to have down are the
02:51:40 3 parties -- the plaintiffs will make a request for additional
02:51:42 4 custodians to individual defendants. That was by 7/27.
02:51:50 5 Defendants will respond to the request by August 3rd. And
02:51:54 6 then plaintiffs shall file any motion to compel by August
02:52:02 7 10th.

02:52:02 8 So here's a perfect time to ask. Mr. Mogin, or
02:52:06 9 anyone else, Mr. Wozniak, what happened with those meet and
02:52:10 10 confers, and are you planning to file any motions tomorrow on
02:52:14 11 this issue?

02:52:16 12 MR. MOGIN: Yes, your Honor, we are planning to file
02:52:18 13 motions tomorrow.

02:52:24 14 THE COURT: All right.

02:52:24 15 MR. MOGIN: We have had very extensive meet and
02:52:30 16 confers that have taken place this week between the defendants
02:52:32 17 and the various plaintiffs' attorneys assigned to (inaudible)
02:52:42 18 defendants. We have reached resolution with a number of
02:52:44 19 defendants, we are very close to resolution with another
02:52:50 20 defendant, and then there is a group of defendants that it
02:52:54 21 appears that motions to compel will be necessary.

02:52:56 22 THE COURT: All right. And then we have that
02:52:58 23 briefing set up that defendant -- that plaintiffs shall file
02:53:04 24 any motion to compel for additional custodians by August 10th,
02:53:10 25 which is tomorrow, and you will tell us who is at issue, and

02:53:14 1 then defendants' responses to that motion are due August 17th.

02:53:22 2 Do you know, defendants, who are going to have to
02:53:26 3 file these responses, and does August 17th still work for you?

02:53:38 4 MR. McKEOWN: Your Honor, this is Jim McKeown on
02:53:40 5 behalf of International Paper. To the extent that we need to
02:53:44 6 file any response, August 17th is fine.

02:53:48 7 THE COURT: Thank you.

02:53:48 8 MR. NEUWIRTH: Steve Neuwirth. To the extent that
02:53:52 9 Georgia-Pacific is required to file a response, assuming there
02:53:56 10 is nothing unexpected in the papers, the 17th will work for
02:54:00 11 us.

02:54:02 12 MR. McCAREINS: Mark McCareins for RockTenn. We are
02:54:04 13 in the same boat.

02:54:06 14 THE COURT: Good.

02:54:06 15 MS. MILLER: Britt Miller for Temple-Inland. Us as
02:54:10 16 well. To the extent we are required to file a response, we
02:54:14 17 will do so on the 17th.

02:54:14 18 THE COURT: Do you think those are the four folks who
02:54:18 19 are going to be the object of your motion?

02:54:20 20 MR. MOGIN: Yes, as well -- let me put it kind of as
02:54:26 21 delicately as I can. Some of the people who spoke I would
02:54:32 22 suggest may be in the middle category where there is still a
02:54:36 23 possibility for resolution.

02:54:38 24 THE COURT: Good.

02:54:38 25 MR. MOGIN: Some of the people who spoke, I think

02:54:42 1 that the likelihood of resolution is very small.

02:54:44 2 THE COURT: Okay.

02:54:44 3 MR. MOGIN: There is one party who hasn't spoken up,
02:54:46 4 and that was Cascades and Norampac, and it seems likely that
02:54:54 5 they will be in the category that will need to respond.

02:54:58 6 THE COURT: Okay. And even after you get Mr. Mogin's
02:55:02 7 motion tomorrow, if you can still resolve it, that's great
02:55:08 8 too. We set these dates only because of my desire -- I mean,
02:55:14 9 we set these dates in hope that I could get as much done by
02:55:20 10 September 30th. It is in no way to discourage you from
02:55:24 11 continuing to talk. Okay? Even if you just narrow it down a
02:55:28 12 little bit, it helps. It certainly helps us, and I think it
02:55:32 13 helps you.

02:55:32 14 So on that, we have opening briefs and responses.
02:55:38 15 Chris put down -- Chris isn't here today, but we put down no
02:55:42 16 replies shall be filed. If we find out after reading them
02:55:46 17 that we need something, we will let you know. Okay?

02:55:52 18 Next thing that you were attempting to work on
02:55:56 19 together that we didn't want to -- was the Georgia-Pacific.
02:56:06 20 You were working on the interrogatories served on
02:56:12 21 Georgia-Pacific. Has that been resolved?

02:56:18 22 MR. NEUWIRTH: Your Honor, this is Steve Neuwirth for
02:56:20 23 Georgia-Pacific. The matter has not been resolved, and,
02:56:24 24 unfortunately, we believe that a motion for a protective order
02:56:26 25 is necessary. As you will recall at the last status

02:56:30 1 conference, counsel for plaintiffs had suggested to the court
02:56:34 2 that at the then upcoming 30(b)(6) deposition of
02:56:44 3 Georgia-Pacific scheduled for August 1st, they hoped to be
02:56:46 4 able to obtain information that would render further pursuit
02:56:50 5 of this interrogatory unnecessary in whole or at least in
02:56:58 6 large part, and I believe at the conclusion of the conference,
02:57:00 7 you specifically asked for a report on how that had proceeded.

02:57:06 8 Georgia-Pacific produced a witness on August 1st who
02:57:12 9 I believe the record will show was extremely well informed and
02:57:16 10 able to answer any questions that he was asked about any of
02:57:20 11 the topics related to the subject matter of the interrogatory.
02:57:26 12 When there was still very substantial time left at the
02:57:30 13 deposition, the plaintiffs indicated that they were ready to
02:57:32 14 end the deposition, and we stated that the witness was
02:57:36 15 available to answer any more questions, and we had to assume
02:57:40 16 that if the deposition was ending, they had achieved anything
02:57:44 17 they needed to be able to withdraw the interrogatory. We were
02:57:48 18 told that was not the case, and we told the plaintiffs to keep
02:57:52 19 asking whatever questions they had to ask. The witness was
02:57:54 20 there and available.

02:57:56 21 There was some additional questioning, but when there
02:57:58 22 was still time left, the plaintiffs ended the deposition. And
02:58:04 23 when we asked the next day if the interrogatory was now going
02:58:06 24 to be withdrawn, we were told that it was not going to be.

02:58:12 25 And in addition to the fact that this interrogatory,

02:58:18 1 as you will recall, was the response that the plaintiffs had
02:58:22 2 to Georgia-Pacific's voluntary act of compromise in making
02:58:26 3 available its list of almost 400 litigation hold recipients,
02:58:32 4 the response of the plaintiffs was to serve an interrogatory
02:58:36 5 which asked very -- you know, at least four very difficult
02:58:40 6 questions about each of these 400 people, including a
02:58:44 7 description of all their job responsibilities for the last
02:58:46 8 eight years, a description of everybody they reported to for
02:58:52 9 the last eight years and their titles, and everybody who
02:58:52 10 reported to them for the last eight years and their titles,
02:58:58 11 and other information. And, you know, this is obviously
02:59:02 12 extremely burdensome and we think a wholly inappropriate
02:59:04 13 response to that act by Georgia-Pacific following the
02:59:10 14 conference with your Honor to try to come up with a way to
02:59:12 15 deal with the absence of organizational charts at the company.

02:59:18 16 In addition, Georgia-Pacific had previously answered
02:59:24 17 interrogatories that were served by plaintiffs on
02:59:26 18 organizational issues, and when Georgia-Pacific in the
02:59:28 19 compromise answered these interrogatories, they were told in
02:59:32 20 writing by the plaintiffs that there would be no further
02:59:34 21 interrogatories on these types of organizational issues.

02:59:38 22 And lastly, we believe that the interrogatory as
02:59:42 23 structured asking at least four questions that have to be
02:59:46 24 separately answered for 400 individuals overtly violates the
02:59:52 25 limitations on interrogatories in the federal rules and the

02:59:54 1 case law that has interpreted what it means to have more than
02:59:58 2 one interrogatory.

03:00:00 3 And so for all of these reasons and with tremendous
03:00:04 4 frustration that this is where our good-faith efforts have
03:00:08 5 ended us up, we would respectfully ask for permission from
03:00:14 6 your Honor to move for a protective order.

03:00:18 7 MR. GOODWIN: Your Honor, may I respond? This is
03:00:18 8 Charles Goodwin. Yes, during the deposition -- actually, let
03:00:24 9 me back up further. I am sure your Honor remembers, and
03:00:24 10 throughout the litigation, Georgia-Pacific has represented
03:00:28 11 that it does not have job descriptions for its employees.
03:00:30 12 Well, during the deposition of Georgia-Pacific's 30(b)(6)
03:00:36 13 representative, we learned that, in fact, Georgia-Pacific
03:00:40 14 prepares job descriptions for its employees annually and
03:00:44 15 apparently throughout the company.

03:00:46 16 I mean, I'm not going to belabor the court with
03:00:52 17 specific plaintiffs where GP had represented that it didn't
03:00:56 18 have job descriptions. And until we learned this fact,
03:01:00 19 plaintiffs were going to cope with the rather cursory
03:01:06 20 descriptions of individual's jobs that the deponent was able
03:01:10 21 to give, but it seems to me that our interrogatory can be
03:01:16 22 handily answered by a production that would run one, maybe two
03:01:18 23 boxes worth of documents in terms of pages.

03:01:22 24 Back in the old paper world, if you will forgive me,
03:01:26 25 I guess I am old fashioned, I am not here to argue the motion

03:01:28 1 today, we will do that on the papers, but this interrogatory
03:01:34 2 is hardly burdensome. It can be handily answered by a small
03:01:40 3 production of paper. It should be relatively easy for
03:01:46 4 Georgia-Pacific to put together. There is really no reason
03:01:50 5 for this. If they prefer to answer and have us move -- well,
03:01:54 6 I guess it's actually better for them to move since they
03:01:58 7 are --

03:01:58 8 THE COURT: No, I think Mr. Marovitz summarized what
03:02:04 9 happened with this, so I think that because this was a very
03:02:08 10 specific series of events that led up to this, and I want to
03:02:12 11 make sure -- I'm actually happy you are filing the motion. I
03:02:16 12 want to make sure that it is clear for the future on how this
03:02:22 13 happened because it was a work in progress by a judge that was
03:02:26 14 trying to figure out a method here; you know, trying to figure
03:02:36 15 out a method that could be fair to both sides.

03:02:44 16 So, Mr. Neuwirth, will you file that -- can you file
03:02:46 17 it within seven days?

03:02:50 18 MR. NEUWIRTH: We can file it by Tuesday, your Honor.

03:02:52 19 THE COURT: Tuesday. Okay.

03:02:52 20 So would you like seven days -- so Tuesday is --

03:02:58 21 Lynette, Tuesday is the 14th.

03:03:00 22 THE CLERK: 14th.

03:03:02 23 THE COURT: Would seven days work for you,

03:03:06 24 Mr. Goodwin?

03:03:08 25 MR. GOODWIN: I believe so. If the court will just

03:03:10 1 forgive me, I am scanning my calendar here, and I think that
03:03:14 2 should be fine.

03:03:16 3 THE COURT: Okay. 21st. And we probably should --
03:03:20 4 on this one, because it will just be simpler just to deal with
03:03:24 5 it, let's give you a short reply.

03:03:28 6 I don't want you to attach the whole 30(b)(6). Okay?
03:03:32 7 I mean, I know that the 30(b)(6) got -- you know, was in there
03:03:38 8 as maybe a way to ask -- I don't want to be plowing over the
03:03:42 9 30(b)(6). The 400 requests that came from that meet and
03:03:48 10 confer to me is a bigger issue than what was asked at the
03:03:52 11 30(b)(6), so I don't want to review the whole record. Okay?

03:03:56 12 MR. GOODWIN: Your Honor, if I may, I am leaving that
03:04:00 13 characterization. We are not scheduling argument here. We
03:04:04 14 are talking about whether or not to have a motion. That
03:04:06 15 characterization is kind of outside of the ballpark, really.
03:04:12 16 It is literally true while being totally misleading, and I am
03:04:14 17 not going to go into this here.

03:04:18 18 THE COURT: It sounds like you got some good stuff
03:04:20 19 out of it anyway, so that was what the function of the
03:04:22 20 30(b)(6) was.

03:04:24 21 Mr. Neuwirth, give you seven days for reply on that
03:04:30 22 one. Okay?

03:04:30 23 MR. NEUWIRTH: Sure, thank you.

03:04:30 24 THE COURT: And that will be the --

03:04:32 25 MR. NEUWIRTH: 21st.

03:04:34 1 THE COURT: No, 14 --

03:04:36 2 MR. NEUWIRTH: 28th, you're correct.

03:04:38 3 THE COURT: 28th.

03:04:40 4 MR. NEUWIRTH: Yes.

03:04:40 5 THE COURT: Then we will just rule by mail.

03:04:42 6 MR. NEUWIRTH: In fact, your Honor, if it's not a

03:04:44 7 problem, because of a conflict I have, we can file our

03:04:48 8 response on the 27th.

03:04:48 9 THE COURT: Good. Even better.

03:04:50 10 All right. Then that was one motion.

03:04:56 11 Another area that you were trying to -- and let's

03:05:00 12 just continue on with you, Mr. Neuwirth, were the James Hannon

03:05:04 13 documents.

03:05:06 14 MR. NEUWIRTH: Yes.

03:05:08 15 THE COURT: And these were documents, and you were to

03:05:10 16 advise the status of producing these documents.

03:05:14 17 MR. NEUWIRTH: And they have been produced.

03:05:24 18 MR. McKEOWN: As of today.

03:05:24 19 THE COURT: Pardon me?

03:05:24 20 MR. McKEOWN: As of -- was it today or yesterday they

03:05:24 21 were produced?

03:05:26 22 THE COURT: Okay.

03:05:26 23 MR. NEUWIRTH: Your Honor, I can assure you that

03:05:28 24 Georgia-Pacific worked in good faith to make the production as

03:05:32 25 promptly as practicable, which it did, and yesterday was

03:05:38 1 really the date when the materials were ready. It was not --
03:05:44 2 obviously we were trying to get it done as quickly as possible
03:05:46 3 before today's conference, but yesterday was when it was
03:05:50 4 ready.

03:05:50 5 THE COURT: Good. Okay.

03:05:52 6 MR. MOGIN: Your Honor, a point of housekeeping on
03:05:54 7 that respect, if I may.

03:05:56 8 THE COURT: Yes. Who is this?

03:05:58 9 MR. MOGIN: This is Mr. Mogin.

03:06:00 10 THE COURT: Okay.

03:06:00 11 MR. MOGIN: I wonder if anybody else has had trouble
03:06:04 12 accessing those documents or whether that's a problem that's
03:06:10 13 unique to my firm?

03:06:12 14 THE COURT: You mean the format or what, Dan?

03:06:14 15 MR. MOGIN: Yes, your Honor. The way the production
03:06:18 16 was made, it was put on what's called a propriety entity site
03:06:24 17 or something like that where we get a password and we go in
03:06:28 18 and download the documents. And we have had -- we have been
03:06:32 19 unable to do so. We worked with the technical people at KPMG,
03:06:38 20 and they basically threw this back to us. And I was wondering
03:06:42 21 if it was truly a problem that was unique to us or others.

03:06:46 22 THE COURT: Mr. Neuwirth, could you have your IT
03:06:50 23 people talk to their IT people and just see? I mean, this
03:06:54 24 isn't really -- it's like a format problem more than you
03:06:56 25 disagreeing on turning over the documents. Can you try to

03:07:00 1 figure that out?

03:07:02 2 MR. NEUWIRTH: Of course. The documents have been
03:07:02 3 turned over to allow Mr. Mogin to see them, so nobody is
03:07:06 4 looking to impede that in any way, and I will be happy to do
03:07:08 5 what I can to facilitate his access.

03:07:12 6 THE COURT: Good.

03:07:12 7 MR. MOGIN: Thank you.

03:07:14 8 THE COURT: Then if the two of you run into a problem
03:07:16 9 on that issue, Chris will be back Monday. Chris is actually
03:07:18 10 very good at formatting. Give him a call. Okay?

03:07:22 11 MR. MOGIN: Sure.

03:07:24 12 THE COURT: Okay. Here is another one that I have
03:07:32 13 down that you were working, everyone was, on transactional
03:07:36 14 data request. This was another one that we put off briefing
03:07:40 15 on hoping that you were going to be able to maybe resolve.
03:07:46 16 Who can speak to this?

03:07:48 17 MR. MOGIN: Mr. Mogin, your Honor. I had made a
03:07:52 18 commitment to Mr. McKeown that I would give him a response
03:07:56 19 before taking off on my trip.

03:08:00 20 THE COURT: Dan, you're fading in and out again. Is
03:08:02 21 there anything else you can -- are you on speaker or anything?
03:08:08 22 I don't know what the problem is.

03:08:08 23 MR. MOGIN: No, I am speaking right into the
03:08:10 24 receiver, your Honor.

03:08:10 25 THE COURT: Okay. Now that sounded better.

03:08:16 1 MR. MOGIN: Is this better, your Honor?

03:08:18 2 THE COURT: Yeah.

03:08:18 3 MR. MOGIN: Okay. I have committed to Mr. McKeown
03:08:22 4 that I would give him a response to his most recent
03:08:26 5 communication before I left for the trip, and we sent that out
03:08:32 6 yesterday. The status, however, is that the plaintiffs still
03:08:40 7 lack certain information to be able to fully comprehend the
03:08:46 8 proposal. We have been through the proposal based on the
03:08:48 9 information that we do have with our experts, and without the
03:08:56 10 additional information that we are seeking, we are unable to
03:09:02 11 give an up or down answer to the defendants' proposal to
03:09:06 12 provide extracts rather than providing the native database.

03:09:14 13 To put some more detail on it, each of the defendants
03:09:18 14 were supposed to provide us with information specific to the
03:09:26 15 data fields that they could provide. Two of the defendants
03:09:28 16 provided it to us just last week, and, unfortunately, it was
03:09:34 17 after our experts had met, so we were missing that
03:09:36 18 information. And then there were a number of things that we
03:09:40 19 had requested that Mr. McKeown indicated the defendants were
03:09:44 20 working on getting together, but we haven't received them.
03:09:48 21 Those were exemplars so that we could get a better
03:09:52 22 understanding of what precisely the defendants were proposing.
03:09:58 23 And so we've responded to him, told him what our concerns are,
03:10:04 24 and I guess at this point, the ball is in their court. I have
03:10:06 25 designated my co-counsel to move the ball forward in my

03:10:14 1 absence.

03:10:20 2 THE COURT: So, defendants, do you need more time?

03:10:24 3 MR. McKEOWN: Your Honor, this is Jim McKeown. On
03:10:26 4 the transactional data field issue, I think we continue to
03:10:30 5 have some disagreements with the plaintiffs about what is
03:10:32 6 needed or appropriate. It strikes me that it might be
03:10:36 7 appropriate for us to try to continue to meet and confer with
03:10:42 8 these topics with plaintiffs. As Mr. Mogin said, we sent a
03:10:46 9 letter yesterday. And perhaps this is a topic that if we are
03:10:50 10 going to have an in-person status in late August, that it be
03:10:56 11 put on the agenda for that.

03:10:58 12 THE COURT: Okay. Here is a little bit more updated
03:11:02 13 news too I want to give you. Something like this that's not
03:11:08 14 -- you know, that's an issue with a little bit more time, with
03:11:12 15 vacations, and with everything else might be able to be worked
03:11:18 16 out. I don't want to do unnecessary briefing here.

03:11:22 17 Chris has been hired by Mary Roland to be her law
03:11:28 18 clerk, so one of the things that I think is very good for you,
03:11:34 19 and I am hoping that Mary Roland will be taking over my
03:11:40 20 calendar, that's not written in stone yet, but you're going to
03:11:46 21 have consistency with Chris here. So I think that should give
03:11:50 22 you a little bit of comfort. And if it is Mary Roland, she
03:11:54 23 was the head of the Seventh Circuit pilot on our whole
03:11:58 24 education program for the last three years. She's very
03:12:00 25 knowledgeable in e-discovery.

03:12:04 1 So if a little bit more time may avert another
03:12:12 2 motion, it's not going to hurt anything down the road, and we
03:12:14 3 can put our efforts in things that are fully ready to be
03:12:18 4 briefed, okay?

03:12:20 5 So I think, Mr. McKeown, that's a good idea. On the
03:12:24 6 transactional, let's give you a couple more weeks, and when
03:12:28 7 you come in at the end of August, we can set briefing. And if
03:12:30 8 Nolan can't do it, then it just rolls over to Roland. Okay?
03:12:36 9 I mean, does that seem to make logical sense then?

03:12:40 10 MR. MOGIN: Yes, your Honor.

03:12:42 11 THE COURT: If anybody else wants to say anything,
03:12:44 12 you know, you could jump in.

03:12:46 13 We have a couple other issues here too.

03:12:50 14 The next one really relates to IP, so Mr. McKeown,
03:12:54 15 while you are on the floor, you and Mr. Mogin can let me know
03:13:00 16 what's happening. And so the record is clear -- I want to say
03:13:08 17 this the correct way -- the court has determined that the most
03:13:10 18 efficient use of the court and parties' time is to address --
03:13:16 19 this is for the requests for production -- issues in stages.
03:13:22 20 And what we ordered is that International Paper would take the
03:13:24 21 lead and that you shall revise -- we ordered this back on the
03:13:32 22 18th, and I'm assuming you are going to tell me you are in the
03:13:36 23 process of it or you've done it -- shall revise its responses
03:13:38 24 to incorporate the information in the chart that was
03:13:42 25 previously prepared, and you were to endeavor to serve its

03:13:54 1 revised RFP's by July 23rd. So did that happen?

03:13:58 2 MR. McKEOWN: Yes, your Honor. We served the revised
03:14:02 3 responses actually three days earlier, on Friday, July 20th.
03:14:06 4 And then I believe at our last telephonic status conference on
03:14:10 5 the 4th, it was left that the plaintiffs were going to get
03:14:12 6 back to us at the end of this week in terms of which ones they
03:14:16 7 still had disagreements with.

03:14:18 8 THE COURT: Okay. Mr. Mogin, I know you have a ton
03:14:22 9 on your plate before you're going out the door, but can you
03:14:24 10 tell us where you are in deciding on the sufficiency of IP's
03:14:32 11 responses?

03:14:34 12 MR. MOGIN: Your Honor, my apologies. I had hoped
03:14:36 13 that Jeff Baum (phonetic), who had been handling this, would
03:14:46 14 be here able to join us today so that he could give a direct
03:14:46 15 report. And I am a little bit out of the loop on this myself.
03:14:50 16 I will say that I am not -- I am a little surprised by the
03:14:58 17 deadline tomorrow.

03:15:00 18 THE COURT: Well, am I wrong? Maybe I am
03:15:04 19 misspeaking.

03:15:04 20 MR. MOGIN: You didn't say it.

03:15:08 21 THE COURT: Oh, Mr. McKeown said it, right.

03:15:10 22 MR. McKEOWN: I thought that in our last conversation
03:15:12 23 with the court that you were going to be back to us by the end
03:15:16 24 of this week if there was an issue. My conversations with
03:15:20 25 Mr. Sprung had been it was obviously a very lengthy document,

03:15:24 1 your Honor, and I believe we discussed this the last time we
03:15:28 2 had a telephonic conference. And they needed more time to
03:15:32 3 look at it, study it. And as of now, we have not had a
03:15:36 4 follow-up meet and confer because Mr. Sprung was still doing
03:15:40 5 it.

03:15:40 6 I mean, what I might suggest if we are going to get
03:15:42 7 this moving and decided before the end of September is we
03:15:48 8 could have the briefing schedule start on the 24th of August
03:15:52 9 if we don't have some agreement by then, and then I think your
03:15:56 10 prior order had set out two-week response, two-week reply.

03:16:04 11 THE COURT: On this particular issue you think that
03:16:06 12 we put -- hold on. Just one minute.

03:16:18 13 The only thing I see, Mr. McKeown, was that we would
03:16:22 14 get a status update today. I don't have any further briefing
03:16:26 15 after that.

03:16:32 16 MR. McKEOWN: I have on the order of July 18th, the
03:16:38 17 very bottom of the page, it starts at the end of -- it starts
03:16:38 18 at the end of the last three lines and continues on to the
03:16:42 19 second page as it prints out on my copy.

03:16:44 20 THE COURT: Oh, two weeks. Okay. Well, particularly
03:16:50 21 since Mr. Sprung isn't on the phone, if nothing else, I will
03:16:54 22 have -- Chris and you and I and Mr. Sprung will have a
03:16:58 23 conversation without everybody else if we have to set this up.
03:17:04 24 This is going to be a major brief. And since we're using you
03:17:08 25 as kind of the guinea pig for everybody else, other people

03:17:14 1 might have some thoughts on this too.

03:17:24 2 So I do think if we are going to set the briefing,
03:17:28 3 then we will have a separate conversation on this. Since
03:17:32 4 Mr. Sprung is not here, I mean, it's not fair --

03:17:34 5 MR. McKEOWN: I understand, your Honor.

03:17:34 6 THE COURT: -- it's not fair to him without getting
03:17:36 7 his input.

03:17:36 8 So, Mr. Mogin, we'd be doing that without --
03:17:42 9 Mr. Sprung is in charge of this part of the case; is that
03:17:44 10 correct?

03:17:44 11 MR. MOGIN: He's got the laboring oar.

03:17:50 12 THE COURT: Mr. Freed, if you want to jump on that
03:17:52 13 phone call if we have to have it.

03:17:54 14 MR. FREED: Yes, your Honor. Thank you. This is
03:17:56 15 Michael Freed. I was going to suggest that I participate
03:18:00 16 since Mr. Mogin will be away.

03:18:00 17 THE COURT: Right. Right. So why don't -- Jim, next
03:18:08 18 week, why don't you talk to Mr. Sprung, Chris will be back
03:18:10 19 next Monday, and if we need to have a conference, we can
03:18:14 20 easily set something up if you really think full-fledged
03:18:20 21 briefing should start on this.

03:18:20 22 MR. McCAREINS: Your Honor, I'm sorry to interrupt.
03:18:26 23 Mark McCareins for RockTenn. I am being asked to get on a
03:18:26 24 plane, so I am going to turn whatever is left to Mr. Mayer.
03:18:30 25 Thank you.

03:18:30 1 THE COURT: Thanks for participating. Have a good
03:18:32 2 trip.

03:18:38 3 MR. McKEOWN: Your Honor, we'd be happy to do that.
03:18:40 4 Alternatively, I think the court suggested earlier that after
03:18:42 5 you see the briefs that are being filed tomorrow, you might be
03:18:44 6 scheduling a telephonic conference.

03:18:44 7 THE COURT: Right. Right.

03:18:48 8 MR. McKEOWN: So we could cover it at that time, so
03:18:50 9 whatever suits your schedule better.

03:18:58 10 THE COURT: Right. Okay. So I guess the big
03:19:12 11 question while we have Mr. Mogin on here, what I should have
03:19:16 12 actually started with, have you entered into a stipulation
03:19:20 13 regarding the search methodology and the need for the
03:19:22 14 September hearing to resume the hearing?

03:19:28 15 MR. FREED: Your Honor, Michael Freed. If I may
03:19:32 16 address this?

03:19:32 17 THE COURT: Sure.

03:19:34 18 MR. FREED: (Inaudible.)

03:19:34 19 THE COURT: Wait, wait. Hold on. Now we are getting
03:19:46 20 an echo.

03:19:46 21 MR. FREED: I'm sorry, Judge. Is it any better now?

03:19:48 22 THE COURT: Yes, it's much better. Thank you.

03:19:50 23 MR. FREED: Sorry. We did draft a stipulation which
03:19:52 24 we sent to the defendants. It essentially set forth the fact
03:19:54 25 that we would agree to not insist on CBAA or predictive coding

03:20:04 1 with respect to the defendants' production in response to the
03:20:08 2 first request and that one of the conditions of that is that
03:20:10 3 we reserved all of our rights and objections and we thought
03:20:14 4 that was what had been discussed and was the understanding.

03:20:18 5 Defendants' response came in with two variations.
03:20:22 6 One was they wanted our agreement regarding the coding of any
03:20:28 7 future discovery in the case, not just be limited to the first
03:20:30 8 request for production. And the second point defendants
03:20:36 9 raised, and this may sound like I'm characterizing it, but I
03:20:40 10 don't have any other way to say it, is they want to put in
03:20:44 11 some language to the effect that they had done everything that
03:20:48 12 could be expected to be required of them to get to the point
03:20:50 13 which we are at, and we felt that kind of language was
03:20:54 14 inappropriate.

03:20:54 15 We felt that, more importantly, the first point is we
03:20:58 16 want to know the future of discovery of the case. We don't
03:21:02 17 know the future of the way courts are going to be looking at
03:21:08 18 Boolean searches compared to predictive coding. And while we
03:21:10 19 certainly are not insisting that at any future production that
03:21:16 20 defendants switch over, we simply don't feel that we are in a
03:21:18 21 position to make that determination now, nor do we think it's
03:21:20 22 appropriate for defendants to demand that because it's really
03:21:24 23 in the nature of an advisory opinion that they are asking your
03:21:28 24 Honor to render since we won't agree to it.

03:21:32 25 So I don't see either of these being the kind of

03:21:36 1 issues which would cause the stipulation idea to fail, but we
03:21:40 2 think both of these conditions the defendants have are simply
03:21:42 3 not appropriate.

03:21:50 4 MR. NEUWIRTH: Your Honor, this is Steve Neuwirth.
03:21:52 5 And if we are at a point where your Honor would like to hear
03:21:56 6 from the defendants, I am authorized to speak, although we
03:22:02 7 don't want to interrupt anything you might have been planning
03:22:06 8 to say at this point.

03:22:06 9 THE COURT: No, I wasn't planning to say anything, so
03:22:08 10 go ahead.

03:22:10 11 MR. NEUWIRTH: Okay. I think that the defendants
03:22:14 12 would characterize their proposal a little differently than
03:22:18 13 Mr. Freed did, although, again, I think this is really fairly
03:22:24 14 a circumstance where we are dealing with a proposal from the
03:22:28 15 plaintiffs. But the defendants believe that we had the
03:22:32 16 hearing that we did before your Honor to address whether the
03:22:38 17 type of technology and approach that the plaintiffs were
03:22:46 18 proposing was appropriate to use in this case. It's true that
03:22:52 19 there was -- that there's been a document request made so far,
03:22:56 20 but I think everybody understands that a new set of document
03:23:04 21 requests can be served on October 2nd.

03:23:08 22 And I think that the only thing the defendants
03:23:10 23 assumed was appropriate here was for the stipulation to cover
03:23:16 24 the subject matter of the hearing; namely, whether in this
03:23:20 25 litigation, defendants will be obligated to use the type of

03:23:26 1 technology that plaintiffs proposed. And we had not
03:23:32 2 understood that question which was the subject matter of the
03:23:36 3 hearing and the briefing and everything else was in any way an
03:23:40 4 advisory opinion and deals specifically with the exact
03:23:42 5 technology that was presented to your Honor for consideration.
03:23:50 6 And certainly plaintiffs believe that another subject matter
03:23:54 7 of the hearing was whether what they had done thus far was
03:24:00 8 appropriate or at least satisfactory under the standards.

03:24:06 9 The defendants were very prepared to expressly say
03:24:14 10 that nothing in this type of stipulation would in any way
03:24:18 11 preclude the plaintiffs at a later time from suggesting that
03:24:22 12 some other new approach, which may not have been available at
03:24:28 13 the time of the hearing, ought to be considered in the case
03:24:32 14 for any subsequent subject matter and subsequent document
03:24:38 15 collection. But, you know, I think that we thought that what
03:24:42 16 we were doing was well within the purview --

03:24:46 17 THE COURT: Mr. Neuwirth, did you suggest that
03:24:48 18 specific language to the plaintiffs?

03:24:50 19 MR. NEUWIRTH: Yes. In fact, the proposal that I
03:24:56 20 believe Mr. McKeown initially sent over expressly had the
03:24:58 21 language that said in either exact words or substance that
03:25:06 22 nothing in the stipulation was meant to preclude the
03:25:08 23 plaintiffs at that later date from suggesting that some new
03:25:14 24 technology that was not the subject matter of the hearing be
03:25:20 25 applied to collections or requests that had not already been

03:25:24 1 undertaken.

03:25:26 2 THE COURT: All right. Can you stop right there?

03:25:28 3 All right. Mr. Freed, that seems to come very close
03:25:34 4 to what you were talking about as far as future productions.

03:25:42 5 MR. FREED: The later draft that was sent to us was
03:25:48 6 sent by Mr. Marovitz, and it did not contain the language, at
03:25:52 7 least in my judgment, that Mr. Neuwirth is speaking about.

03:25:58 8 THE COURT: Okay.

03:26:04 9 MR. FREED: And the real question is, does the
03:26:06 10 agreement -- because we agreed to forestall our request for
03:26:10 11 the review through the predictive coding.

03:26:14 12 THE COURT: Right.

03:26:14 13 MR. FREED: Subsequently, we agreed to forestall any
03:26:18 14 hearing on the basis of a stipulation which would protect our
03:26:22 15 position. We understood at all times that what was up before
03:26:28 16 the court was the document that had been collected and
03:26:30 17 reviewed by the defendant in response to the first request for
03:26:34 18 production. We are not saying that they have to agree that we
03:26:36 19 can raise that in the future. We are simply saying we don't
03:26:40 20 want a condition that says we can't raise it in the future.

03:26:44 21 THE COURT: But that's -- unless I am
03:26:46 22 misunderstanding, now, I don't have any draft in front of me,
03:26:54 23 but it sounds like what Mr. Neuwirth just told me is that they
03:27:02 24 had some language in there about future productions and that
03:27:08 25 that might -- that did not -- it either didn't say that their

03:27:16 1 -- it did not preclude producing -- yes?

03:27:28 2 MR. FREED: I don't mean to interrupt. I think I see
03:27:30 3 what you are saying. I will be happy to go back if we want to
03:27:34 4 put this off for a short period of time and re-review what has
03:27:38 5 been submitted to us. But what Mr. McKeown said has really
03:27:42 6 not been what we have been working off of. The very last
03:27:48 7 draft that we received from Andy Marovitz is the one I am
03:27:52 8 speaking about. If I am mistaken, I would be more than happy
03:27:58 9 to admit it and say it's not a problem, but I don't
03:27:58 10 remember -- and I looked at it very closely -- that there was
03:28:02 11 anything in there which gave us that protection.

03:28:06 12 MR. NEUWIRTH: Let me -- I'm sorry, Mr. Freed. I
03:28:08 13 didn't mean to cut you off.

03:28:10 14 MR. FREED: No, that's it.

03:28:12 15 MR. NEUWIRTH: I was going to make two points. I
03:28:14 16 think what may have happened here is that the language that
03:28:18 17 had been in Mr. McKeown's originally transmitted draft was
03:28:22 18 either edited out or defendants perceived that it was being
03:28:26 19 edited out, and it may not have made its way back into the
03:28:30 20 draft that Mr. Marovitz had sent back, which was an effort to
03:28:34 21 try to see if we could reach some sort of reasonable
03:28:40 22 compromise.

03:28:40 23 Just so that there is no misunderstanding, what I had
03:28:44 24 intended to convey was that the defendants have understood
03:28:50 25 that the hearings before your Honor were for the purpose of

03:28:52 1 determining whether in this case the defendants are going to
03:29:00 2 be required to use the specific approaches and technologies
03:29:04 3 that were presented to your Honor at the hearing. And
03:29:10 4 defendants are assuming that the stipulation would address
03:29:14 5 that question, say, in this case, the defendants are not
03:29:20 6 required to use those specific technologies and that as to the
03:29:24 7 first corpus of documents that were collected in the first
03:29:28 8 production that was done in response to these requests, what
03:29:32 9 defendants did satisfied the governing standards.

03:29:38 10 And then we were going to say, I think we did say in
03:29:42 11 the draft expressly, as to any future document requests that
03:29:46 12 the plaintiffs may make and as to any future collections of
03:29:52 13 documents beyond this initial corpus that was already
03:29:54 14 collected, nobody is foreclosed from arguing that some new
03:30:00 15 technology that may be developed that was not the subject of
03:30:04 16 the hearing before the court should be used. And all sides,
03:30:08 17 all parties respect the right to either argue in favor of that
03:30:12 18 or to argue against it. But certainly we would not expect
03:30:16 19 your Honor to say anything about a technology that was not
03:30:20 20 before the court at the time.

03:30:22 21 So we thought that this was responsive, and that is
03:30:26 22 what led to the goal -- the draft that Mr. McKeown had
03:30:30 23 originally transmitted with I think very express language to
03:30:34 24 that effect.

03:30:34 25 MR. FREED: Michael Freed, your Honor. I think I see

03:30:38 1 three things. Number one, the language which Mr. McKeown put
03:30:42 2 into a fire draft did not survive, so there was no reason for
03:30:46 3 plaintiffs to believe that it was included.

03:30:48 4 THE COURT: Right.

03:30:48 5 MR. FREED: Two more points. I've heard Mr. Neuwirth
03:30:54 6 a second time is he is saying, number one, he believes a
03:30:56 7 stipulation should refer to the entire case, not just the
03:31:00 8 first request for production; and, number two, it should be
03:31:04 9 some new technology, which I presume he means something more
03:31:08 10 than CBAA or predictive coding.

03:31:10 11 MR. NEUWIRTH: Something different from what was
03:31:12 12 presented.

03:31:14 13 MR. FREED: Okay. We are not prepared to reach a
03:31:16 14 stipulation on that basis, and this would even be an
03:31:26 15 impediment because we thought we were going to move this ahead
03:31:28 16 tremendously by avoiding the hearing. And just saying if it
03:31:32 17 arises in the future, we all start at ground zero, and
03:31:36 18 obviously everybody would take a position (inaudible) --

03:31:48 19 THE COURT: Mr. Freed, hang on one minute. The last
03:31:50 20 minute or so was kind of cracked again.

03:31:54 21 MR. FREED: You know, it may be the way I am holding
03:31:58 22 it. I am on a cellular phone. I do apologize.

03:32:02 23 MR. NEUWIRTH: The one concern, your Honor, is that
03:32:04 24 when Mr. Freed speaks about going back to ground zero, I am
03:32:08 25 sure you can understand why that is such a concern to the

03:32:10 1 defendants because --

03:32:12 2 THE COURT: Right.

03:32:12 3 MR. NEUWIRTH: -- the resources that were invested in
03:32:16 4 presenting all of this to your Honor, and your Honor was very
03:32:18 5 educated and had the benefit of hearing live witnesses, the
03:32:24 6 notion that after that, as Mr. Freed literally just said, is
03:32:28 7 once you are gone, if this comes up that defendants want to
03:32:30 8 suggest again that predictive coding be used, the exact same
03:32:34 9 thing that was before your Honor, we start at ground zero, we
03:32:36 10 thought the whole point of the stipulation was to avoid that,
03:32:38 11 and a stipulation that would let us go back to ground zero
03:32:46 12 seems to be the opposite of what court efficiency and
03:32:48 13 reasonable response to all that's been done would call for.

03:32:54 14 MR. MOGIN: Your Honor, Dan Mogin. May I interject
03:32:56 15 something, please?

03:32:58 16 THE COURT: Yes.

03:32:58 17 MR. MOGIN: When Mr. Neuwirth speaks in terms of "the
03:33:02 18 case," as I said before, antitrust cases tend to last a long
03:33:08 19 time.

03:33:08 20 THE COURT: Right.

03:33:10 21 MR. MOGIN: And so since he'd like to speak in
03:33:12 22 hypotheticals, let's speak in the hypothetical that it's four
03:33:16 23 years from now, and plaintiffs want to serve another document
03:33:22 24 request. And four years, predictive coding is the accepted
03:33:28 25 state of the art because the technology has advanced.

03:33:32 1 Under Mr. Neuwirth's formulation, we, the plaintiffs,
03:33:36 2 would be precluded from seeking to have used predictive coding
03:33:46 3 at that time because, quote, it would be the same technology.

03:33:50 4 MR. NEUWIRTH: No, it wouldn't be the same
03:33:52 5 technology.

03:33:52 6 MR. MOGIN: Excuse me. A Model T is the same
03:33:58 7 technology -- that is, an automobile -- as a 2012 Ferrari.
03:34:04 8 Are we talking about the same thing?

03:34:10 9 They are seeking -- in that instance, clearly they
03:34:14 10 are seeking an advisory opinion. Our undertaking that we will
03:34:20 11 not raise the issue again with respect to that which it first
03:34:26 12 attached, the first request for production of documents, the
03:34:32 13 idea that we would in a month and a half send out another
03:34:38 14 round of document requests and make a similar demand is
03:34:44 15 insulting and ludicrous. But there's no reason that we should
03:34:52 16 be forever precluded from using the best available technology.

03:34:54 17 THE COURT: But you're talking over each other, I
03:35:00 18 think -- I actually think you're too good of lawyers. This is
03:35:02 19 one time the court is going to say you are too good at this.

03:35:08 20 I think we need a stipulation for dummies here. I
03:35:12 21 think the first part of the stipulation, okay, says something
03:35:18 22 like, The plaintiffs withdraw their objection to the first
03:35:26 23 production based upon Boolean search or something like the
03:35:34 24 Boolean search method, that you are withdrawing your objection
03:35:42 25 to the method itself, not to the search itself, okay, but to

03:35:50 1 the method that was raised in -- there isn't even a motion on
03:35:54 2 this. Then, to me, that stops the need for the evidentiary
03:36:00 3 hearing. That explains why we are not going ahead with the
03:36:06 4 evidentiary hearing. I thought inherent in that if a year
03:36:12 5 from now when you have reviewed the documents and you want to,
03:36:16 6 quote, unquote, like you could in any other case, say, Hey,
03:36:22 7 there is a problem, we didn't get, you know, document 27, 28,
03:36:30 8 29, I thought inherent in that, of course, you could bring
03:36:32 9 that up. That's not going back to the method itself. I
03:36:40 10 thought you were preserving the ability to object.

03:36:44 11 Then because antitrust cases do go on five years, in
03:36:50 12 production -- suppose it goes to the Seventh Circuit in the
03:36:52 13 middle, who the heck knows what the heck is going to happen,
03:36:56 14 and there has to be another document production. I would
03:36:58 15 think this time are, for the future, you would both agree to
03:37:04 16 do a meaningful meet and confer. If you ever had to do
03:37:08 17 another major production, you would first agree to try to
03:37:12 18 agree on what the method would be and that you then would
03:37:20 19 discuss with each other, maybe you would agree to what the
03:37:24 20 method is, and if you couldn't, you'd come to the court at
03:37:28 21 that time. It is not a redo of what we have done. But that's
03:37:34 22 what I thought you were doing.

03:37:36 23 Any reaction to that?

03:37:48 24 MR. FREED: That's what I thought we were doing too.

03:37:50 25 THE COURT: To me, you were specifically withdrawing

03:37:52 1 your objection to the use of the Boolean search on the
03:37:54 2 documents that have been produced or in the process of being
03:37:58 3 produced.

03:37:58 4 You're not saying it was good, bad, indifferent; all
03:38:02 5 you're doing is withdrawing your objection.

03:38:06 6 Now, somebody react to me. What's the matter with --
03:38:10 7 that goes to what's been done already and that I am just
03:38:14 8 making this up as I am sitting there, but a future, if there
03:38:20 9 are future searches, something like what I threw out there,
03:38:26 10 would that be something you could work on, in 25 words or
03:38:34 11 less?

03:38:36 12 MR. NEUWIRTH: I think that the concept that you
03:38:36 13 described is the concept that defendants have been trying to
03:38:42 14 achieve with the following caveat, which I believe is not
03:38:46 15 inconsistent with what your Honor said, and so "caveat" may
03:38:52 16 not even be the right word.

03:38:54 17 Your Honor described a scenario where at some point
03:38:56 18 in the not immediate future, things had developed and there is
03:39:04 19 a request -- a new request that is made, your example after,
03:39:08 20 let's say, a remand from the Seventh Circuit --

03:39:12 21 THE COURT: Right.

03:39:12 22 MR. NEUWIRTH: -- which could be years off and many
03:39:16 23 legal developments away, and I don't believe that the
03:39:20 24 defendants are concerned about a scenario way down the road.
03:39:24 25 And I also think that the defendants had always intended

03:39:26 1 language in that original draft from Mr. McKeown to clearly
03:39:32 2 say that a 2008 Ford with a different engine and different
03:39:38 3 wheels is not the same thing as 1995 Ford. I don't think
03:39:44 4 anybody is suggesting that technology can't evolve, and we may
03:39:52 5 get to a point in the future where there is something new that
03:39:54 6 makes sense to use.

03:39:56 7 But the big gap, the big hole that is left that we
03:39:58 8 think that your proposed order might also be intended to
03:40:02 9 address is the short-term future where we are talking about
03:40:08 10 the exact same approach that was presented to your Honor using
03:40:14 11 a 1996 Ford again, the exact same car, on a set of document
03:40:20 12 requests that is not triggered by some development three years
03:40:26 13 down the road but that is triggered by either, you know, the
03:40:30 14 desire to reintroduce the idea of the methodology that the
03:40:36 15 plaintiffs had proposed or that is an effort to expand a scope
03:40:40 16 of discovery beyond where we were at this time. And what the
03:40:46 17 defendants are concerned about is that gap -- and we have
03:40:52 18 tried to come up with language that struck a balance so that
03:40:54 19 what you described would occur exactly as you described it,
03:40:58 20 that if in the future there are new requests seeking different
03:41:04 21 documents to be collected and there is some new technology
03:41:08 22 available to use, it's fair game, of course, but what we want
03:41:12 23 to avoid is that four months from now --

03:41:14 24 THE COURT: Right, right.

03:41:16 25 MR. NEUWIRTH: -- after we have had this long process

03:41:20 1 with you that we are back at ground zero on the exact same
03:41:24 2 thing that we spent all this time with you about.

03:41:26 3 MR. McKEOWN: Your Honor, this is Jim McKeown. If I
03:41:28 4 could add just one more point from our concern, which is it's
03:41:28 5 not just the documents that are produced, because obviously
03:41:30 6 the documents that are produced have been produced. They
03:41:34 7 don't need to be searched again. But there was a large
03:41:38 8 selection of documents that were collected to which search
03:41:40 9 terms were applied.

03:41:40 10 THE COURT: Right.

03:41:42 11 MR. McKEOWN: And it's that entire group that we
03:41:44 12 shouldn't have to go back again.

03:41:46 13 It's a different question if four years from now
03:41:48 14 somebody says, You searched through the end of 2010, we are
03:41:52 15 four years later and some development says search 2011.
03:41:56 16 That's entirely different than what we did before.

03:42:02 17 THE COURT: Okay. So this discussion, at least, so
03:42:04 18 it's more the interim phase here. I sort of thought the
03:42:12 19 stipulation could have the A being what is either produced or
03:42:20 20 in the process of being produced, that's A, what applies to
03:42:22 21 that. Then there seems to be what you're concerned about is
03:42:28 22 this interim or, you know, next year or so. And then future,
03:42:34 23 I think you kind of agree on the -- or you could agree on the
03:42:38 24 future if you had it language-wise.

03:42:42 25 Mr. Mogin, do you have any like little secret agendas

03:42:46 1 a year from now? I mean, I don't know what you can say to
03:42:48 2 assure somebody.

03:42:50 3 MR. MOGIN: I don't know what I can say either, your
03:42:52 4 Honor. I don't have any secret agenda. I am not particularly
03:42:58 5 anxious to go through this again.

03:42:58 6 THE COURT: You are fading away.

03:43:00 7 MR. MOGIN: I said I am not particularly anxious to
03:43:02 8 go through this process again. It's time consuming, it's very
03:43:08 9 expensive, and I think that the defendants fear that the
03:43:14 10 plaintiffs would do that. It's just not well founded. We
03:43:18 11 have done nothing in the case that would indicate that that's
03:43:22 12 how we operate.

03:43:32 13 MR. NEUWIRTH: Your Honor, can I make a suggestion?
03:43:32 14 This is Mr. Neuwirth.

03:43:32 15 THE COUR: Yes.

03:43:34 16 MR. NEUWIRTH: Given the helpful comment that
03:43:36 17 Mr. Mogin made, I would propose that you give the parties a
03:43:40 18 few days to see if together we can come up with a proposal
03:43:44 19 that would work off of the framework you described and also
03:43:48 20 build in something to address the statements that Mr. Mogin
03:43:54 21 just made, and, you know, perhaps we can get back to you. And
03:44:00 22 I -- you know, I know that Mr. McKeown and Mr. Marovitz and
03:44:02 23 other defense counsel had been very involved in this, and I
03:44:08 24 think we can work with Mr. Freed and Mr. Mogin to the extent
03:44:12 25 he's available to try to come up with something that reflects

03:44:14 1 the substance of today's discussion with your Honor.

03:44:20 2 THE COURT: Yes. And I think you're going to have --
03:44:24 3 you know I don't want to go back to the hearing, but, you
03:44:28 4 know, that's like personal. Okay?

03:44:32 5 But you're not going to be able to get -- here's the
03:44:40 6 basic thing I've learned as a judge. Don't try to get more
03:44:44 7 out of an agreement, a settlement, a stipulation than you ever
03:44:52 8 could if we went full fledged at the hearing. All I can rule
03:44:56 9 on is what is in front of me.

03:45:00 10 I am hoping with this stipulation, it's going to give
03:45:04 11 you a little bit more comfort, but is it going to be a hundred
03:45:08 12 percent in the future? No, but the hearing wouldn't give you
03:45:12 13 that either, either side.

03:45:18 14 MR. MOGIN: Your Honor, Dan Mogin --

03:45:20 15 THE COURT: What I am trying to say to you is I would
03:45:22 16 think you would want to keep it -- you want to try to
03:45:26 17 incorporate what both -- what all sides' concerns are, but
03:45:34 18 don't try to get it a hundred percent perfect or it's not
03:45:36 19 going to work. You have a very fair judge who could help you
03:45:42 20 out with that.

03:45:46 21 MR. MOGIN: Your Honor?

03:45:46 22 THE COURT: Yes.

03:45:48 23 MR. MOGIN: It's Dan Mogin. I appreciate everything
03:45:50 24 you just said. I heard it loud and clear. If you could
03:45:54 25 indulge me for a minute, I am getting an urgent personal call

03:46:02 1 from a physician, and I will be right back, and you can
03:46:02 2 continue without me.

03:46:02 3 THE COURT: Go do your personal urgent. I think we
03:46:06 4 need to see something on paper, and Mr. Neuwirth, and
03:46:10 5 Mr. Freed, Mr. Wozniak, if you want to send it to me and
03:46:14 6 Chris, we will also help you tweak it if we can a little bit.
03:46:18 7 Okay?

03:46:20 8 MR. FREED: That's a good idea. Michael Freed, your
03:46:22 9 Honor. Let us take another crack at it.

03:46:24 10 THE COURT: Yes. Right.

03:46:26 11 MR. FREED: If we reach a point where we are really
03:46:28 12 down to some very discrete issues, then maybe the court's
03:46:32 13 guidance would be very helpful.

03:46:32 14 THE COURT: Right. And I am more than happy to do
03:46:36 15 it. You know, I have the two -- we should pick one day or the
03:46:38 16 other, but I still have it blocked off if, God forbid, we had
03:46:44 17 to go back to it, but I think you're actually very close here.
03:46:48 18 Just don't try to make it too much, or that's not going to
03:46:56 19 work. And as I say, I couldn't give you that kind of
03:47:00 20 guarantee at the hearing anyway. Okay?

03:47:04 21 So we will await your draft.

03:47:06 22 Let me see. That was search methodology.

03:47:10 23 The RFP and indexing, we might do -- we might have
03:47:18 24 just another -- we will either have an IP and Mr. Freed call
03:47:26 25 and Mr. Sprung, or we may turn that in to everyone call.

03:47:30 1 Data sources we are set on with some kind of follow

03:47:38 2 -- we are meeting August 29th here, right?

03:47:42 3 MR. MOGIN: Right.

03:47:42 4 THE COURT: We are sticking to that date.

03:47:44 5 Now, one of the things I did notice is that August
03:47:46 6 29th is the Thursday before Labor Day, and then we do have you
03:47:52 7 set for the day after Labor Day, but I am still hoping either
03:47:58 8 the Tuesday or Wednesday.

03:48:00 9 And Ms. Miller, Mr. Regard is available both days?

03:48:04 10 MS. MILLER: Yes, your Honor. Mr. Regard is holding
03:48:08 11 both days, the 4th and the 5th.

03:48:10 12 THE COURT: Why don't we pick one or the other.

03:48:12 13 Somebody flip a coin. I mean, I am hoping we are not going to
03:48:16 14 need it, but if we need it, at least let's pick one or the
03:48:22 15 other.

03:48:24 16 MR. McKEOWN: Your Honor, this is Jim McKeown. I
03:48:28 17 believe that Mr. Mogin was the first given Labor Day. We
03:48:30 18 asked that it be --

03:48:30 19 THE COURT: Oh, Wednesday. Let's do Wednesday.

03:48:34 20 MR. McKEOWN: We don't have an objection to that.

03:48:36 21 THE COURT: All right. So if we need to do it, it
03:48:36 22 would be Wednesday, not Tuesday. Okay.

03:48:50 23 Well, how do you feel about another -- Mr. Mogin will
03:48:50 24 be gone, but everybody else, how about another telephone
03:48:52 25 status, because I do think this is helpful, and it's not

03:48:58 1 dragging everybody here. Would you be interested in that?

03:49:04 2 MR. FREED: Sure, your Honor. Michael Freed. I
03:49:08 3 think to set a date would be useful.

03:49:10 4 THE COURT: What about Tuesday, August 21st?

03:49:20 5 MR. FREED: Fine for me.

03:49:20 6 MR. NEUWIRTH: That's fine for me.

03:49:20 7 THE COURT: I can do it in the afternoon. I have
03:49:22 8 plenty of time. Chris will send a little agenda out. And by
03:49:28 9 that time, you will have some language on the evidentiary
03:49:32 10 hearing so we'd know more on that. Hopefully IP will know
03:49:38 11 more on the request to produce. I will have looked at more
03:49:42 12 briefs, so I may know what we are doing on that.

03:49:46 13 Are there any new issues? I also hadn't even asked
03:49:50 14 if we had any new issues.

03:49:58 15 MR. FREED: No.

03:49:58 16 THE COURT: No?

03:50:00 17 And I will have at least a little portion of the
03:50:06 18 Georgia-Pacific interrogatories. Hopefully, you will have
03:50:08 19 gotten the Jim Hannon disk opened by that time.

03:50:18 20 And the custodians. What did we do -- you're still
03:50:22 21 trying to work that out, or did we set a briefing on the
03:50:24 22 custodians?

03:50:26 23 MS. MILLER: Your Honor, Britt Miller. You had
03:50:30 24 already set -- there is an existing briefing schedule for the
03:50:34 25 custodian issues. Plaintiffs are to file by tomorrow, and

03:50:36 1 defendants who need to respond are filing on the 17th, and
03:50:40 2 there is no reply.

03:50:42 3 THE COURT: Okay. Then let's set Tuesday, August
03:50:50 4 21st. If we did 1:30 Chicago time, that's 2:00 o'clock for --
03:50:56 5 or 2:30 for our friends from New York. Is that okay?

6 MR. NEUWIRTH: Yes, your Honor.

7 MR. FELLER: Your Honor, is there any chance we could
8 start at 1:00?

9 THE COURT: Yes. Yes.

10 THE COURT REPORTER: Who is that?

11 THE COURT: Who suggested 1:00 o'clock?

03:51:16 12 MR. FELLER: I'm sorry, your Honor. Leonid Feller
03:51:16 13 for PCA.

03:51:18 14 THE COURT: Mr. Feller, that's a good idea. Let's
03:51:18 15 start at 1:00 o'clock.

03:51:22 16 MR. FELLER: Thank you.

03:51:22 17 THE COURT: I am going to try to get Ms. Cox or some
03:51:26 18 other court reporter because it really helps when we have the
03:51:28 19 court reporter here. My taping system goes in and out.

03:51:30 20 Ms. Miller, would you help me out here today? Chris
03:51:34 21 isn't here. Lynette, poor Lynette trying to keep track of all
03:51:38 22 these motions and junk. Will you send us over just in an
03:51:44 23 email that you send to everybody what I said datewise where we
03:51:50 24 are at, because I am talking and trying to write at the same
03:51:56 25 time?

03:51:56 1 MS. MILLER: Yes, your Honor. I would be happy to do
03:51:56 2 so.

03:51:58 3 THE COURT: Thank you.

03:51:58 4 Anybody have anything else that we should wind up?

03:52:04 5 MR. McKEOWN: Jim McKeown. Just one other item. I
03:52:08 6 think currently, the August 29th hearing was the one in which
03:52:10 7 we were going to discuss whether any replies and time for
03:52:14 8 replies (inaudible) for the brief. If we are meeting on the
03:52:18 9 21st, we are going to file our response tomorrow, that would
03:52:20 10 give the plaintiff 11 days. Perhaps we could move up what we
03:52:24 11 are going to do as to replies to the 21st rather than the
03:52:28 12 29th.

03:52:30 13 THE COURT: So you're suggesting that the -- well, if
03:52:34 14 we had the seven-day -- I'm sorry. I am just kind of -- I
03:52:40 15 think you're making a good suggestion, but I don't know what
03:52:44 16 it is. Tell me what it is.

03:52:48 17 MR. McKEOWN: Your Honor, I think that the purpose
03:52:50 18 for the hearing on the 29th, one of the purposes originally,
03:52:54 19 was by that date the plaintiff would say how much time they
03:52:58 20 needed for the reply on the date of the first brief. Rather
03:53:00 21 than wait until the 29th, given that your Honor is retiring at
03:53:02 22 the end of September, perhaps if plaintiffs could tell us on
03:53:06 23 the 21st what they anticipate for a briefing schedule, that
03:53:10 24 would save a week for everyone.

03:53:12 25 THE COURT: Well, I actually think -- that's fine,

03:53:18 1 but I actually think the 29th may be an oral argument on the
03:53:22 2 data sources, so -- because when I read everything today, this
03:53:28 3 is really fact specific here, and if I am going to try to be
03:53:34 4 fair to each of your systems, I think we will make some
03:53:42 5 progress.

03:53:42 6 So are you suggesting that we set the reply brief
03:53:46 7 right now and then I'd have it fully briefed by the 29th?

03:53:52 8 MR. McKEOWN: No, your Honor. Just on the 21st that
03:53:54 9 one of our agenda items be that the court let us know
03:54:00 10 precisely what you want us to do --

03:54:00 11 THE COURT: Okay. I will. But I am telling you that
03:54:02 12 I think in addition to any writing, I am probably also going
03:54:08 13 to need some oral argument or charts or something to help me
03:54:12 14 with this because it is so fact specific. And even if you do
03:54:24 15 the -- I mean, even in the short amount that I read today, I
03:54:30 16 have a number of questions in the margins about how the
03:54:34 17 plaintiffs were describing your systems is what I am saying.
03:54:40 18 Okay?

03:54:40 19 I will have your reply and I will look at your reply
03:54:44 20 before the phone call on the 21st. That would help, right?
03:54:50 21 And that will be top on the agenda on how we are going to
03:54:52 22 handle it.

03:54:52 23 Okay. And then, once again, you know your case so
03:54:58 24 much better. We are throwing these agenda items out just to
03:55:02 25 try to be helpful, but if you've got any ideas too, we still

03:55:06 1 have about 50 days left, so let's see what we can get done.

03:55:12 2 MS. MILLER: Your Honor, we will provide a dial-in
03:55:16 3 for the 21st again.

03:55:16 4 THE COURT: Thank you very much.

03:55:20 5 Then I still have held -- we have still held, just in
03:55:24 6 case, the date -- hold on. I am looking at another one.
03:55:32 7 September 13th, in-person status, if needed. I have still
03:55:40 8 reserved that. Okay? And that could be if we are down to
03:55:42 9 data sources and we need any meeting on data source, I mean, I
03:55:46 10 just want you to know, I am not saying you have to make
03:55:50 11 reservations, but I have reserved that date also.

03:55:54 12 MR. MOGIN: Good. Thank you, your Honor.

03:55:56 13 MS. MILLER: Thank you, your Honor.

03:55:56 14 THE COURT: Okay, everybody. Have a good week.

03:55:58 15 Mr. Mogin, are you back?

03:56:00 16 MR. MOGIN: I am back, your Honor.

03:56:00 17 THE COURT: I hope you have a fabulous -- I love
03:56:04 18 Hawaii. I am so jealous.

03:56:06 19 MR. MOGIN: Thank you very much.

03:56:08 20 THE COURT: So have a wonderful trip. And we are
03:56:08 21 going to meet on the 29th. Don't worry on the 21st. You are
03:56:14 22 in great hands with all those helpful people you've got.

03:56:22 23 We will see you then on the 29th, and Chris will send
03:56:26 24 something out, an agenda, and add to it anything you want.

03:56:28 25 Probably, Mr. McKeown, we will probably be talking

03:56:38 1 about the request to produce in that August 21st. We are
03:56:40 2 probably not going to do anything before that. Okay?

03:56:44 3 MR. McCAREINS: Thank you.

03:56:46 4 THE COURT: All right, everybody. Bye.

5 (Which were all the proceedings had in the above-entitled
6 cause on the day and date aforesaid.)

7 I certify that the foregoing is a correct transcript from
8 the record of proceedings in the above-entitled matter.

9 _____
Carolyn R. Cox
10 Official Court Reporter
Northern District of Illinois

Date

11 /s/Carolyn R. Cox, CSR, RPR, CRR, FCRR

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<p style="text-align: center;">/</p> <p>/s/Carolyn [1] - 51:11</p> <p style="text-align: center;">1</p> <p>10010 [1] - 3:8 10th [2] - 11:7, 11:24 11 [1] - 48:10 1100 [1] - 2:18 115 [1] - 2:6 13th [1] - 50:7 14 [1] - 19:1 14th [2] - 17:21, 17:22 1622 [1] - 2:3 17th [6] - 12:1, 12:3, 12:6, 12:10, 12:17, 47:1 18th [3] - 4:10, 24:22, 26:16 19103 [1] - 2:3 1995 [1] - 40:3 1996 [1] - 40:11 1:00 [3] - 47:8, 47:11, 47:15 1:30 [1] - 47:4 1st [2] - 14:3, 14:8</p>	<p style="text-align: center;">3</p> <p>30(b)(6) [5] - 14:2, 16:12, 18:7, 18:11, 18:20 30(b)(6) [2] - 18:6, 18:9 300 [1] - 2:11 30th [1] - 13:10 3100 [1] - 3:3 312 [6] - 2:8, 2:12, 2:19, 2:22, 3:4, 3:13 332-3400 [1] - 2:8 35 [1] - 3:12 372-1121 [1] - 3:4 3rd [1] - 11:5</p> <p style="text-align: center;">4</p> <p>400 [4] - 15:3, 15:6, 15:24, 18:9 414 [1] - 2:15 4400 [1] - 3:16 45 [1] - 4:23 4th [2] - 25:5, 45:11</p> <p style="text-align: center;">5</p> <p>50 [1] - 50:1 51 [1] - 3:8 53202 [1] - 2:15 558-5902 [1] - 3:13 5th [1] - 45:11</p>	<p>able [13] - 7:3, 7:4, 10:9, 10:13, 14:4, 14:10, 14:17, 16:20, 21:15, 22:7, 23:15, 25:14, 43:5 above-entitled [2] - 51:5, 51:7 absence [2] - 15:15, 23:1 accepted [1] - 36:24 access [1] - 21:5 accessible [2] - 9:13, 9:25 accessing [1] - 20:12 achieve [1] - 39:14 achieved [1] - 14:16 act [2] - 15:2, 15:13 add [2] - 41:4, 50:24 addition [3] - 14:25, 15:16, 49:12 additional [4] - 11:3, 11:24, 14:21, 22:10 address [6] - 24:18, 28:16, 30:16, 34:4, 40:9, 42:20 addressed [1] - 9:21 administrative [1] - 5:7 admit [1] - 33:9 advanced [1] - 36:25 advise [2] - 8:6, 19:16 advisory [3] - 29:23, 31:4, 37:10 aforesaid [1] - 51:6 afternoon [1] - 46:7 agenda [7] - 23:11, 42:4, 46:8, 49:9, 49:21, 49:24, 50:24 agendas [1] - 41:25 ago [1] - 9:16 agree [9] - 28:25, 29:24, 32:18, 38:15, 38:17, 38:18, 38:19, 41:23 agreed [2] - 32:10, 32:13 agreement [6] - 6:12, 6:17, 26:9, 29:6, 32:10, 43:7 ahead [3] - 30:10, 35:15, 38:3 airport [1] - 4:19 allow [1] - 21:3 almost [1] - 15:3 alternatively [1] - 28:4 America [1] - 2:10 amount [1] - 49:15 Andy [1] - 33:7 annually [1] - 16:14 answer [4] - 14:10, 14:15, 17:5, 22:11 answered [5] - 15:16, 15:19, 15:24, 16:22, 17:2 anticipate [1] - 48:23 anticipated [2] - 6:25, 7:21 antitrust [2] - 36:18, 38:11 anxious [2] - 42:5, 42:7 anyway [3] - 9:7, 18:19, 44:20 apologies [1] - 25:12 apologize [1] - 35:22 APPEARANCES [2] - 2:1, 3:1 applied [2] - 31:25, 41:9 applies [1] - 41:20 appreciate [1] - 43:23 approach [3] - 30:17, 31:12, 40:10 approaches [1] - 34:2 appropriate [7] - 23:6, 23:7, 29:22,</p>
<p style="text-align: center;">2</p> <p>2008 [1] - 40:2 2010 [1] - 41:14 2011 [1] - 41:15 2012 [1] - 37:7 20th [1] - 25:3 212-849-7000 [1] - 3:9 215 [1] - 2:4 21st [12] - 18:3, 18:25, 46:4, 47:4, 48:9, 48:11, 48:23, 49:8, 49:20, 50:3, 50:21, 51:1 22 [1] - 4:7 224 [1] - 2:18 227 [1] - 3:16 22nd [1] - 3:8 23rd [1] - 25:1 24th [4] - 7:2, 8:2, 8:11, 26:8 25 [1] - 39:10 26th [1] - 4:11 27 [1] - 38:7 27th [1] - 19:8 28 [1] - 38:7 28th [2] - 19:2, 19:3 29 [1] - 38:8 2910 [1] - 2:7 297-5530 [1] - 2:15 29th [14] - 10:3, 10:6, 10:12, 10:13, 45:2, 45:6, 48:6, 48:12, 48:18, 48:21, 49:1, 49:7, 50:21, 50:23 2:00 [1] - 47:4 2:30 [1] - 47:5 2nd [1] - 30:21</p>	<p style="text-align: center;">6</p> <p>60601 [1] - 3:13 60602 [1] - 3:4 60603 [1] - 2:7 60604 [1] - 2:18 60606 [2] - 2:22, 3:16 60654 [1] - 2:11 660-7600 [1] - 2:19</p> <p style="text-align: center;">7</p> <p>7/27 [1] - 11:4 70 [1] - 3:3 71 [1] - 2:21 777 [1] - 2:14 782-0600 [1] - 2:22</p> <p style="text-align: center;">8</p> <p>862-3144 [1] - 2:12 875-3000 [1] - 2:4</p> <p style="text-align: center;">A</p> <p>ability [1] - 38:10</p>	

<p>30:3, 30:18, 30:23, 31:8 area [1] - 19:11 argue [3] - 16:25, 34:17, 34:18 arguing [1] - 34:14 argument [4] - 10:12, 18:13, 49:1, 49:13 arises [1] - 35:17 art [1] - 36:25 assigned [1] - 11:17 assume [1] - 14:15 assumed [1] - 30:23 assuming [3] - 12:9, 24:22, 34:4 assure [2] - 19:23, 42:2 attach [1] - 18:6 attached [2] - 8:23, 37:12 attachments [1] - 8:17 attempting [1] - 13:18 attorneys [1] - 11:17 August [21] - 7:2, 8:11, 10:3, 10:6, 11:5, 11:6, 11:24, 12:1, 12:3, 12:6, 14:3, 14:8, 23:10, 24:7, 26:8, 45:2, 45:5, 46:4, 47:3, 48:6, 51:1 authorized [1] - 30:6 automobile [1] - 37:7 available [8] - 14:15, 14:20, 15:3, 31:12, 37:16, 40:22, 42:25, 45:9 Ave [1] - 2:18 Avenue [2] - 2:14, 3:8 avert [1] - 24:1 avoid [2] - 36:10, 40:23 avoiding [1] - 35:16 await [1] - 44:21</p>	<p>23:12, 23:14, 23:22, 24:1, 25:15, 43:11, 44:6 blocked [1] - 44:16 boat [1] - 12:13 Boolean [4] - 29:18, 37:23, 37:24, 39:1 bottom [1] - 26:17 boxes [1] - 16:23 brief [5] - 8:20, 26:24, 48:8, 48:20, 49:6 briefed [2] - 24:4, 49:7 briefing [15] - 10:20, 10:24, 10:25, 11:23, 21:14, 23:16, 24:7, 26:8, 26:14, 27:2, 27:21, 31:3, 46:21, 46:24, 48:23 briefs [3] - 13:14, 28:5, 46:12 bring [2] - 10:5, 38:8 Britt [5] - 5:2, 8:15, 9:15, 12:15, 46:23 BRITT [1] - 2:21 BROWN [1] - 2:20 build [1] - 42:20 burden [1] - 7:24 burdensome [2] - 15:12, 17:2 BY [9] - 2:2, 2:6, 2:10, 2:17, 2:21, 3:3, 3:7, 3:11, 3:15 bye [1] - 51:4</p>	<p>Circuit [3] - 23:23, 38:12, 39:20 circumstance [1] - 30:14 claims [1] - 7:24 clear [3] - 17:12, 24:16, 43:24 clearly [2] - 37:9, 40:1 clerk [1] - 23:18 CLERK [3] - 6:4, 6:8, 17:22 close [3] - 11:19, 32:3, 44:17 closely [1] - 33:10 co [1] - 22:25 co-counsel [1] - 22:25 coconut [1] - 10:5 coding [8] - 28:25, 29:6, 29:18, 32:11, 35:10, 36:8, 36:24, 37:2 coin [1] - 45:13 collected [5] - 32:16, 34:7, 34:14, 40:21, 41:8 collection [1] - 31:15 collections [2] - 31:25, 34:12 combined [2] - 8:16, 9:17 comfort [2] - 23:22, 43:11 comment [1] - 42:16 commitment [1] - 21:18 committed [1] - 22:3 communication [1] - 22:5 company [2] - 15:15, 16:15 Company [1] - 3:15 compared [1] - 29:18 compel [4] - 9:11, 11:6, 11:21, 11:24 comprehend [1] - 22:7 compromise [3] - 15:2, 15:19, 33:22 concept [2] - 39:12, 39:13 concern [3] - 35:23, 35:25, 41:4 concerned [3] - 39:24, 40:17, 41:21 concerns [2] - 22:23, 43:17 conclusion [1] - 14:6 condition [1] - 32:20 conditions [2] - 29:2, 30:2 confer [6] - 4:12, 10:23, 18:10, 23:7, 26:4, 38:16 conference [8] - 14:1, 14:6, 15:14, 20:3, 25:4, 26:2, 27:19, 28:6 conferencing [1] - 4:5 confers [3] - 10:22, 11:10, 11:16 conflict [1] - 19:7 consideration [1] - 31:5 considered [1] - 31:13 consistency [1] - 23:21 consuming [1] - 42:8 Cont'd [1] - 2:2 contain [1] - 32:6 contained [1] - 6:14 continue [4] - 19:12, 23:4, 23:7, 44:2 CONTINUED [2] - 2:1, 3:1 continues [1] - 26:18 continuing [1] - 13:11 conversation [3] - 25:22, 26:23, 27:3 conversations [1] - 25:24 convey [1] - 33:24 cope [1] - 16:19</p>
B		
<p>bad [1] - 39:4 balance [1] - 40:18 ball [2] - 22:24, 22:25 ballpark [1] - 18:15 BARACK [1] - 2:10 base [1] - 4:11 based [3] - 4:10, 22:8, 37:23 basic [1] - 43:6 basis [2] - 32:14, 35:14 Baum [1] - 25:13 become [1] - 6:11 behalf [1] - 12:5 belabor [1] - 16:16 believes [1] - 35:6 benefit [1] - 36:5 BERGER [1] - 2:2 best [2] - 10:17, 37:16 better [12] - 7:15, 7:17, 7:18, 17:6, 19:9, 21:25, 22:1, 22:21, 28:9, 28:21, 28:22, 49:24 between [1] - 11:16 beyond [2] - 34:13, 40:16 big [3] - 28:10, 40:7 bigger [1] - 18:10 bit [12] - 7:7, 7:12, 7:13, 8:13, 13:12,</p>	<p style="text-align: center;">C</p> <p>calendar [2] - 18:1, 23:20 car [1] - 40:11 Carolyn [3] - 4:4, 4:7, 51:9 Cascades [2] - 3:3, 13:4 case [15] - 14:18, 16:1, 27:9, 29:7, 29:16, 30:18, 31:13, 34:1, 34:5, 35:7, 36:18, 38:6, 42:11, 49:23, 50:6 cases [2] - 36:18, 38:11 catch [1] - 4:23 category [2] - 12:22, 13:5 caveat [2] - 39:14, 39:15 CBAA [2] - 28:25, 35:10 cellular [1] - 35:22 certain [1] - 22:7 certainly [5] - 8:12, 13:12, 29:19, 31:6, 34:18 certify [1] - 51:7 chance [1] - 47:7 change [1] - 7:13 characterization [2] - 18:13, 18:15 characterize [1] - 30:12 characterizing [1] - 29:9 charge [1] - 27:9 CHARLES [1] - 2:2 Charles [1] - 16:8 chart [1] - 24:24 charts [2] - 15:15, 49:13 check [1] - 7:3 Chicago [8] - 2:7, 2:11, 2:18, 2:22, 3:4, 3:13, 3:16, 47:4 Chris [14] - 5:22, 10:7, 13:15, 21:9, 23:17, 23:21, 26:22, 27:18, 44:6, 46:8, 47:20, 50:23</p>	

<p>copy [1] - 26:19 Corporation [1] - 2:10 corpus [2] - 34:7, 34:13 correct [6] - 9:14, 10:3, 19:2, 24:17, 27:10, 51:7 counsel [4] - 5:3, 14:1, 22:25, 42:23 couple [2] - 24:6, 24:13 COUR [1] - 42:15 course [3] - 21:2, 38:8, 40:22 Court [1] - 51:9 court [19] - 4:1, 8:6, 14:1, 16:16, 17:25, 22:24, 24:17, 24:18, 25:23, 28:4, 32:16, 34:16, 34:20, 36:12, 37:19, 38:20, 47:18, 47:19, 49:9 COURT [118] - 4:2, 4:22, 5:1, 5:4, 5:14, 5:19, 6:1, 6:6, 6:9, 6:21, 6:24, 7:11, 7:14, 7:16, 7:18, 7:25, 8:3, 8:8, 8:19, 9:2, 9:19, 9:22, 10:6, 11:14, 11:22, 12:7, 12:14, 12:18, 12:24, 13:2, 13:6, 17:8, 17:19, 17:23, 18:3, 18:18, 18:24, 19:1, 19:3, 19:5, 19:9, 19:15, 19:19, 19:22, 20:5, 20:8, 20:10, 20:14, 20:22, 21:6, 21:8, 21:12, 21:20, 21:25, 22:2, 23:2, 23:12, 24:11, 25:8, 25:18, 25:21, 26:11, 26:20, 27:6, 27:12, 27:17, 28:1, 28:7, 28:10, 28:17, 28:19, 28:22, 30:9, 31:17, 32:2, 32:8, 32:12, 32:21, 35:4, 35:19, 36:2, 36:16, 36:20, 37:17, 38:25, 39:21, 40:24, 41:10, 41:17, 42:6, 43:2, 43:15, 43:22, 44:3, 44:10, 44:14, 45:4, 45:12, 45:19, 45:21, 46:4, 46:7, 46:16, 47:3, 47:9, 47:10, 47:11, 47:14, 47:17, 48:3, 48:13, 48:25, 49:11, 50:4, 50:14, 50:17, 50:20, 51:4 court's [1] - 44:12 courtroom [1] - 4:3 courts [1] - 29:17 cover [2] - 28:8, 30:23 Cox [3] - 47:17, 51:9, 51:11 CP [1] - 3:11 crack [1] - 44:9 cracked [1] - 35:20 CRR [1] - 51:11 CSR [1] - 51:11 cursory [1] - 16:19 curtail [1] - 7:23 custodian [1] - 46:25 custodians [4] - 11:4, 11:24, 46:20, 46:22 cut [1] - 33:13</p>	<p>dates [2] - 13:8, 13:9 datewise [1] - 47:23 days [10] - 17:17, 17:20, 17:23, 18:21, 25:3, 42:18, 45:9, 45:11, 48:10, 50:1 deadline [2] - 7:5, 25:17 deal [2] - 15:15, 18:4 dealing [1] - 30:14 deals [1] - 31:4 decided [1] - 26:7 deciding [1] - 25:10 Defendant [7] - 2:9, 2:13, 2:20, 3:2, 3:6, 3:11, 3:15 defendant [8] - 4:16, 7:8, 8:18, 8:22, 10:9, 11:20, 11:23, 32:17 defendant's [1] - 7:21 defendants [39] - 4:17, 8:15, 11:4, 11:5, 11:16, 11:18, 11:19, 11:20, 12:2, 22:13, 22:15, 22:19, 22:22, 23:2, 28:24, 29:8, 29:20, 29:22, 30:2, 30:6, 30:11, 30:15, 30:22, 30:25, 31:9, 33:18, 33:24, 34:1, 34:4, 34:5, 34:9, 36:1, 36:7, 39:13, 39:24, 39:25, 40:17, 42:9, 47:1 defendants' [6] - 4:15, 9:17, 12:1, 22:11, 29:1, 29:5 defense [1] - 42:23 delicately [1] - 12:21 demand [2] - 29:22, 37:14 deponent [1] - 16:20 deposition [7] - 14:2, 14:13, 14:14, 14:16, 14:22, 16:8, 16:12 described [5] - 39:13, 39:17, 40:19, 42:19 describing [1] - 49:17 description [2] - 15:7, 15:8 descriptions [4] - 16:11, 16:14, 16:18, 16:20 designated [1] - 22:25 desire [2] - 13:8, 40:14 detail [2] - 10:13, 22:13 determination [1] - 29:21 determined [1] - 24:17 determining [1] - 34:1 developed [2] - 34:15, 39:18 development [2] - 40:12, 41:15 developments [1] - 39:23 dial [1] - 50:2 dial-in [1] - 50:2 different [6] - 35:11, 40:2, 40:20, 41:13, 41:16 differently [1] - 30:12 difficult [1] - 15:5 direct [1] - 25:14 disagreeing [1] - 20:25 disagreements [2] - 23:5, 25:7 discourage [1] - 13:10 discovery [4] - 23:25, 29:7, 29:16, 40:16 discrete [1] - 44:12 discuss [2] - 38:19, 48:7 discussed [3] - 7:20, 26:1, 29:4 discussion [2] - 41:17, 43:1</p>	<p>disk [1] - 46:19 District [1] - 51:10 DIVER [1] - 3:15 docket [1] - 6:11 document [11] - 25:25, 30:19, 30:20, 31:14, 32:16, 34:11, 36:23, 37:14, 38:7, 38:14, 40:11 documentation [1] - 7:10 documents [20] - 9:11, 9:12, 16:23, 19:13, 19:15, 19:16, 20:12, 20:18, 20:25, 21:2, 34:7, 34:13, 37:12, 38:5, 39:2, 40:21, 41:5, 41:6, 41:8 done [12] - 7:1, 13:9, 20:2, 24:23, 29:11, 31:7, 34:8, 36:13, 38:21, 39:7, 42:11, 50:1 door [1] - 25:9 down [13] - 8:11, 11:1, 11:2, 13:11, 13:15, 21:13, 22:11, 24:2, 39:24, 40:13, 44:12, 50:8 download [1] - 20:18 draft [11] - 28:23, 32:5, 32:22, 33:7, 33:17, 33:20, 34:11, 34:22, 35:2, 40:1, 44:21 dragging [1] - 46:1 Drive [2] - 2:21, 3:12 due [4] - 6:25, 7:2, 10:16, 12:1 dummies [1] - 37:20 during [2] - 16:8, 16:12</p>
D		
<p>Dan [7] - 7:6, 7:11, 20:14, 21:20, 36:14, 43:14, 43:23 data [9] - 9:11, 9:20, 21:14, 22:15, 23:4, 45:1, 49:2, 50:9 database [1] - 22:12 Date [1] - 51:9 date [10] - 8:2, 20:1, 31:23, 45:4, 46:3, 48:19, 48:20, 50:6, 50:11, 51:6</p>		<p style="text-align: center;">E</p> <p>e-discovery [1] - 23:25 easily [1] - 27:20 East [1] - 2:14 easy [1] - 17:3 echo [1] - 28:20 ECHOLS [1] - 2:10 edited [2] - 33:18, 33:19 educated [1] - 36:5 education [1] - 23:24 effect [2] - 29:11, 34:24 efficiency [1] - 36:12 efficient [1] - 24:18 effort [2] - 33:20, 40:15 efforts [2] - 16:4, 24:3 eight [3] - 15:8, 15:9, 15:10 EIMER [2] - 2:17, 2:17 either [14] - 10:7, 10:12, 29:25, 31:21, 32:25, 33:18, 34:17, 40:13, 41:19, 42:3, 43:13, 44:24, 45:7 ELLIS [1] - 2:9 email [1] - 47:23 EMANUEL [1] - 3:6 EMERY [1] - 3:15 employees [2] - 16:11, 16:14 end [9] - 14:14, 24:7, 25:6, 25:23, 26:7, 26:17, 26:18, 41:14, 48:22 endeavor [1] - 24:25 ended [2] - 14:22, 16:5 ending [1] - 14:16</p>

<p>engine ^[1] - 40:2 enter ^[2] - 5:12, 5:24 entered ^[2] - 4:10, 28:12 entire ^[2] - 35:7, 41:11 entirely ^[1] - 41:16 entitled ^[2] - 51:5, 51:7 entity ^[1] - 20:16 essentially ^[1] - 28:24 events ^[1] - 17:10 evidentiary ^[3] - 38:2, 38:4, 46:9 evolve ^[1] - 40:4 exact ^[6] - 31:4, 31:21, 36:8, 40:10, 40:11, 41:1 exactly ^[1] - 40:19 example ^[1] - 39:19 exceed ^[2] - 8:21, 9:1 excuse ^[1] - 37:6 exemplars ^[1] - 22:21 existing ^[1] - 46:24 expand ^[1] - 40:15 expect ^[2] - 8:20, 34:18 expected ^[1] - 29:12 expensive ^[1] - 42:9 experts ^[2] - 22:9, 22:17 explains ^[2] - 4:21, 38:3 express ^[1] - 34:23 expressly ^[3] - 31:9, 31:20, 34:11 extension ^[1] - 8:25 extensive ^[1] - 11:15 extent ^[4] - 12:5, 12:8, 12:16, 42:24 extracts ^[1] - 22:12 extremely ^[3] - 10:4, 14:9, 15:12</p>	<p>fields ^[1] - 22:15 figure ^[4] - 10:8, 17:14, 21:1 file ^[26] - 5:9, 5:10, 5:13, 5:16, 5:17, 5:19, 6:2, 6:4, 6:15, 6:20, 8:24, 11:6, 11:10, 11:12, 11:23, 12:3, 12:6, 12:9, 12:16, 17:16, 17:18, 19:7, 46:25, 48:9 filed ^[3] - 7:8, 13:16, 28:5 filing ^[5] - 5:6, 8:15, 8:18, 17:11, 47:1 fine ^[7] - 5:24, 8:10, 12:6, 18:2, 46:5, 46:6, 48:25 fire ^[1] - 35:2 firm ^[1] - 20:13 first ^[16] - 4:13, 6:12, 29:2, 29:7, 29:15, 32:17, 34:7, 35:8, 37:11, 37:12, 37:21, 37:22, 38:17, 45:17, 48:20 five ^[2] - 10:21, 38:11 fledged ^[2] - 27:20, 43:8 flight ^[1] - 4:23 flip ^[1] - 45:13 floor ^[1] - 24:15 Floor ^[1] - 3:8 FOLEY ^[1] - 2:13 folks ^[1] - 12:18 follow ^[2] - 26:4, 45:1 follow-up ^[1] - 26:4 following ^[3] - 4:1, 15:13, 39:14 forbid ^[1] - 44:16 Ford ^[3] - 40:2, 40:3, 40:11 foreclosed ^[1] - 34:14 foregoing ^[1] - 51:7 forestall ^[2] - 32:10, 32:13 forever ^[1] - 37:16 forgive ^[2] - 16:24, 18:1 formal ^[1] - 8:24 format ^[2] - 20:14, 20:24 formatting ^[1] - 21:10 formulation ^[1] - 37:1 forth ^[1] - 28:24 forward ^[2] - 6:12, 22:25 founded ^[1] - 42:10 four ^[8] - 12:18, 15:5, 15:23, 36:22, 36:24, 40:23, 41:13, 41:15 framework ^[1] - 42:19 freed ^[10] - 27:12, 30:13, 32:3, 33:12, 35:19, 35:24, 36:6, 42:24, 44:5, 44:24 FREED ^[20] - 27:14, 28:15, 28:18, 28:21, 28:23, 32:5, 32:9, 32:13, 33:2, 33:14, 34:25, 35:5, 35:13, 35:21, 38:24, 44:8, 44:11, 46:2, 46:5, 46:15 Freed ^[5] - 27:15, 28:15, 34:25, 44:8, 46:2 Friday ^[1] - 25:3 friends ^[1] - 47:5 front ^[2] - 32:22, 43:9 frustration ^[1] - 16:4 full ^[2] - 27:20, 43:8 full-fledged ^[1] - 27:20 fully ^[3] - 22:7, 24:3, 49:7 function ^[1] - 18:19 future ^[22] - 17:12, 29:7, 29:16, 29:17, 29:19, 32:4, 32:19, 32:20, 32:24, 34:11,</p>	<p>34:12, 35:17, 38:15, 39:8, 39:9, 39:18, 40:5, 40:9, 40:20, 41:22, 41:24, 43:12</p> <p>G</p> <p>game ^[1] - 40:22 gap ^[2] - 40:7, 40:17 GATES ^[1] - 3:2 Georgia ^[17] - 3:7, 12:9, 13:19, 13:21, 13:23, 14:3, 14:8, 15:2, 15:13, 15:16, 15:18, 16:10, 16:12, 16:13, 17:4, 19:24, 46:18 Georgia-Pacific ^[15] - 3:7, 12:9, 13:19, 13:21, 13:23, 14:3, 14:8, 15:13, 15:16, 15:18, 16:10, 16:13, 17:4, 19:24, 46:18 Georgia-Pacific's ^[2] - 15:2, 16:12 given ^[3] - 42:16, 45:17, 48:21 glad ^[1] - 5:14 goal ^[1] - 34:22 God ^[1] - 44:16 good-faith ^[1] - 16:4 GOODWIN ^[4] - 2:2, 16:7, 17:25, 18:12 Goodwin ^[2] - 16:8, 17:24 governing ^[1] - 34:9 GP ^[1] - 16:17 grant ^[2] - 5:15, 5:16 great ^[2] - 13:7, 50:22 ground ^[5] - 35:17, 35:24, 36:9, 36:11, 41:1 group ^[2] - 11:20, 41:11 guarantee ^[1] - 44:20 guess ^[4] - 16:25, 17:6, 22:24, 28:10 guidance ^[1] - 44:13 guinea ^[1] - 26:25</p>
<p>F</p>		<p>H</p>
<p>fabulous ^[1] - 50:17 facilitate ^[1] - 21:5 fact ^[9] - 10:24, 14:25, 16:13, 16:18, 19:6, 28:24, 31:19, 49:3, 49:14 facts ^[1] - 10:18 factual ^[2] - 7:9, 7:23 factually ^[1] - 9:23 fading ^[2] - 21:20, 42:6 fail ^[1] - 30:1 fair ^[6] - 17:15, 27:4, 27:6, 40:22, 43:19, 49:4 fairly ^[1] - 30:13 faith ^[2] - 16:4, 19:24 far ^[4] - 4:25, 30:19, 31:7, 32:4 fashioned ^[1] - 16:25 favor ^[1] - 34:17 FCRR ^[1] - 51:11 fear ^[1] - 42:9 federal ^[1] - 15:25 Feller ^[2] - 47:12, 47:14 FELLER ^[4] - 2:10, 47:7, 47:12, 47:16 felt ^[2] - 29:13, 29:15 Ferrari ^[1] - 37:7 few ^[1] - 42:18 field ^[1] - 23:4</p>		<p>half ^[1] - 37:13 handily ^[2] - 16:22, 17:2 handle ^[1] - 49:22 handling ^[1] - 25:13 hands ^[2] - 10:10, 50:22 hang ^[1] - 35:19 Hannon ^[2] - 19:12, 46:19 happy ^[10] - 5:10, 5:11, 8:25, 17:11, 21:4, 28:3, 33:3, 33:8, 44:14, 48:1 hardly ^[1] - 17:2 Hawaii ^[1] - 50:18 head ^[1] - 23:23 hear ^[2] - 9:2, 30:5 heard ^[2] - 35:5, 43:24 hearing ^[22] - 28:14, 30:16, 30:24, 31:3, 31:7, 31:13, 31:24, 32:14, 34:3, 34:16, 35:16, 36:5, 38:3, 38:4, 43:3, 43:8, 43:12, 44:20, 46:10, 48:6, 48:18 hearings ^[1] - 33:25 heavily ^[1] - 7:9 heavy ^[1] - 6:11 heck ^[2] - 38:13 held ^[2] - 50:5</p>

<p>help [5] - 43:19, 44:6, 47:20, 49:13, 49:20</p> <p>helpful [5] - 42:16, 44:13, 45:25, 49:25, 50:22</p> <p>helps [4] - 13:12, 13:13, 47:18</p> <p>hi [1] - 4:2</p> <p>hired [1] - 23:17</p> <p>hold [6] - 6:1, 8:2, 15:3, 26:12, 28:19, 50:6</p> <p>hold-the-date [1] - 8:2</p> <p>holding [2] - 35:21, 45:10</p> <p>hole [1] - 40:7</p> <p>Honor [76] - 5:2, 5:11, 5:12, 5:18, 6:19, 6:23, 7:6, 7:17, 8:14, 9:15, 10:4, 11:12, 12:4, 13:22, 15:14, 16:6, 16:7, 16:9, 17:18, 18:12, 19:6, 19:23, 20:6, 20:15, 21:17, 21:24, 22:1, 23:3, 24:10, 25:2, 25:12, 26:1, 27:5, 27:14, 27:22, 28:3, 28:15, 29:24, 30:4, 30:5, 30:16, 31:5, 33:25, 34:3, 34:19, 34:25, 35:23, 36:4, 36:9, 36:14, 39:15, 39:17, 40:10, 41:3, 42:4, 42:13, 43:1, 43:14, 43:21, 44:9, 45:10, 45:16, 46:2, 46:23, 47:6, 47:7, 47:12, 48:1, 48:17, 48:21, 49:8, 50:2, 50:12, 50:13, 50:16</p> <p>Honor's [1] - 5:6</p> <p>hope [2] - 13:9, 50:17</p> <p>hoped [2] - 14:3, 25:12</p> <p>hopefully [2] - 46:10, 46:18</p> <p>hoping [5] - 21:15, 23:19, 43:10, 45:7, 45:13</p> <p>housekeeping [1] - 20:6</p> <p>hundred [2] - 43:11, 43:18</p> <p>hurt [1] - 24:2</p> <p>hypothetical [1] - 36:22</p> <p>hypotheticals [1] - 36:22</p>	<p>indicated [2] - 14:13, 22:19</p> <p>indicating [1] - 5:13</p> <p>indifferent [1] - 39:4</p> <p>individual [1] - 11:4</p> <p>individual's [1] - 16:20</p> <p>individuals [1] - 15:24</p> <p>indulge [1] - 43:25</p> <p>information [10] - 6:14, 10:7, 14:4, 15:11, 22:7, 22:9, 22:10, 22:14, 22:18, 24:24</p> <p>informed [1] - 14:9</p> <p>inherent [2] - 38:4, 38:8</p> <p>initial [1] - 34:13</p> <p>Inland [5] - 2:21, 5:3, 8:15, 9:16, 12:15</p> <p>input [1] - 27:7</p> <p>insist [1] - 28:25</p> <p>insisting [1] - 29:19</p> <p>instance [1] - 37:9</p> <p>instructed [1] - 5:22</p> <p>insulting [1] - 37:15</p> <p>intended [3] - 33:24, 39:25, 40:8</p> <p>interested [1] - 46:1</p> <p>interim [2] - 41:18, 41:22</p> <p>interject [1] - 36:14</p> <p>International [3] - 2:14, 12:5, 24:20</p> <p>interpreted [1] - 16:1</p> <p>interrogatories [6] - 13:20, 15:17, 15:19, 15:21, 15:25, 46:18</p> <p>interrogatory [10] - 14:5, 14:11, 14:17, 14:23, 14:25, 15:4, 15:22, 16:2, 16:21, 17:1</p> <p>interrupt [3] - 27:22, 30:7, 33:2</p> <p>invested [1] - 36:3</p> <p>involved [1] - 42:23</p> <p>IP [3] - 24:14, 44:24, 46:10</p> <p>IP's [1] - 25:10</p> <p>issue [10] - 5:5, 11:11, 11:25, 18:10, 21:9, 23:4, 23:14, 25:24, 26:11, 37:11</p> <p>issues [12] - 8:17, 10:21, 10:25, 15:18, 15:21, 24:13, 24:19, 30:1, 44:12, 46:13, 46:14, 46:25</p> <p>IT [2] - 20:22, 20:23</p> <p>item [1] - 48:5</p> <p>items [3] - 10:16, 49:9, 49:24</p> <p>itself [3] - 37:25, 38:9</p>	<p>Judge [2] - 4:9, 28:21</p> <p>judge [4] - 4:18, 17:13, 43:6, 43:19</p> <p>judgment [1] - 32:7</p> <p>July [5] - 4:10, 4:11, 25:1, 25:3, 26:16</p> <p>jump [2] - 24:12, 27:12</p> <p>junk [1] - 47:22</p>
I		
<p>idea [6] - 24:5, 30:1, 37:13, 40:14, 44:8, 47:14</p> <p>ideas [1] - 49:25</p> <p>IL [7] - 2:7, 2:11, 2:18, 2:22, 3:4, 3:13, 3:16</p> <p>Illinois [1] - 51:10</p> <p>immediate [1] - 39:18</p> <p>impede [1] - 21:4</p> <p>impediment [1] - 35:15</p> <p>importantly [1] - 29:15</p> <p>in-person [3] - 10:2, 23:10, 50:7</p> <p>inappropriate [2] - 15:12, 29:14</p> <p>inaudible [4] - 11:17, 28:18, 35:18, 48:8</p> <p>inclined [1] - 5:12</p> <p>included [1] - 35:3</p> <p>including [1] - 15:6</p> <p>inconsistent [1] - 39:15</p> <p>incorporate [2] - 24:24, 43:17</p> <p>indexing [1] - 44:23</p> <p>indicate [1] - 42:11</p>	J	
	<p>James [1] - 19:12</p> <p>JAMES [1] - 2:14</p> <p>jealous [1] - 50:18</p> <p>Jeff [1] - 25:13</p> <p>JENNIFER [1] - 3:15</p> <p>jet [1] - 10:5</p> <p>jet-lagged [1] - 10:5</p> <p>Jim [7] - 12:4, 23:3, 27:17, 41:3, 45:16, 46:19, 48:5</p> <p>job [4] - 15:7, 16:11, 16:14, 16:18</p> <p>jobs [1] - 16:20</p> <p>join [1] - 25:14</p>	<p>K</p> <p>keep [3] - 14:18, 43:16, 47:21</p> <p>kind [15] - 7:3, 7:11, 8:10, 10:12, 10:17, 12:20, 18:15, 26:25, 29:13, 29:25, 35:20, 41:23, 44:19, 45:1, 48:14</p> <p>KIRKLAND [1] - 2:9</p> <p>knowledgeable [1] - 23:25</p> <p>knows [1] - 38:13</p> <p>KPMG [1] - 20:19</p> <p>L</p> <p>Labor [3] - 45:6, 45:7, 45:17</p> <p>laboring [1] - 27:11</p> <p>lack [1] - 22:7</p> <p>lagged [1] - 10:5</p> <p>language [13] - 29:11, 29:13, 31:18, 31:21, 32:6, 32:24, 33:16, 34:23, 35:1, 40:1, 40:18, 41:24, 46:9</p> <p>language-wise [1] - 41:24</p> <p>LARDNER [1] - 2:13</p> <p>large [2] - 14:6, 41:7</p> <p>LaSalle [2] - 2:6, 2:11</p> <p>last [14] - 5:22, 13:25, 15:7, 15:9, 15:10, 22:16, 23:24, 25:4, 25:22, 26:1, 26:18, 33:6, 35:19, 36:18</p> <p>lastly [1] - 15:22</p> <p>late [1] - 23:10</p> <p>law [2] - 16:1, 23:17</p> <p>LAW [1] - 2:5</p> <p>lawyers [1] - 37:18</p> <p>lead [2] - 4:25, 24:21</p> <p>learned [3] - 16:13, 16:18, 43:6</p> <p>least [9] - 7:7, 14:5, 15:5, 15:23, 31:8, 32:7, 41:17, 45:14, 46:17</p> <p>leaving [1] - 18:12</p> <p>led [2] - 17:10, 34:22</p> <p>left [7] - 14:12, 14:22, 22:5, 25:5, 27:24, 40:7, 50:1</p> <p>legal [1] - 39:23</p> <p>lei [1] - 10:5</p> <p>lengthy [1] - 25:25</p> <p>Leonid [1] - 47:12</p> <p>LEONID [1] - 2:10</p> <p>less [1] - 39:11</p> <p>letter [1] - 23:9</p> <p>likelihood [1] - 13:1</p> <p>likely [2] - 7:9, 13:4</p> <p>limit [1] - 9:1</p> <p>limitations [1] - 15:25</p> <p>limited [1] - 29:7</p>

<p>limits [2] - 8:21, 8:25 lines [1] - 26:18 list [1] - 15:3 literally [2] - 18:16, 36:6 litigation [3] - 15:3, 16:10, 30:25 live [1] - 36:5 LLC [2] - 2:5, 3:11 LLP [8] - 2:9, 2:13, 2:17, 2:20, 3:2, 3:7, 3:11, 3:15 Locust [1] - 2:3 logical [1] - 24:9 look [2] - 26:3, 49:19 looked [2] - 33:10, 46:11 looking [3] - 21:4, 29:17, 50:6 loop [1] - 25:15 loud [1] - 43:24 love [1] - 50:17 ludicrous [1] - 37:15 Lynette [4] - 6:1, 17:21, 47:21</p>	<p>method [8] - 17:14, 17:15, 37:24, 37:25, 38:1, 38:9, 38:18, 38:20 methodology [3] - 28:13, 40:14, 44:22 MICHAEL [1] - 3:11 Michael [5] - 27:15, 28:15, 34:25, 44:8, 46:2 Michigan [1] - 2:18 middle [2] - 12:22, 38:13 might [11] - 10:11, 23:6, 23:15, 26:6, 27:1, 28:5, 30:7, 32:25, 40:8, 44:23 Mike [1] - 4:24 MILLER [16] - 2:5, 2:21, 5:2, 5:5, 5:17, 6:19, 8:14, 8:20, 9:15, 9:20, 12:15, 45:10, 46:23, 48:1, 50:2, 50:13 Miller [8] - 5:2, 6:9, 8:15, 9:15, 12:15, 45:9, 46:23, 47:20 Milwaukee [1] - 2:15 minute [6] - 5:12, 6:1, 26:12, 35:19, 35:20, 43:25 minutes [1] - 4:24 misleading [1] - 18:16 missing [1] - 22:17 misspeaking [1] - 25:19 mistaken [1] - 33:8 misunderstanding [2] - 32:22, 33:23 Model [1] - 37:6 MOGIN [41] - 6:23, 7:6, 7:13, 7:15, 7:17, 7:19, 8:1, 8:4, 10:4, 11:12, 11:15, 12:20, 12:25, 13:3, 20:6, 20:9, 20:11, 20:15, 21:7, 21:11, 21:17, 21:23, 22:1, 22:3, 24:10, 25:12, 25:20, 27:11, 36:14, 36:17, 36:21, 37:6, 42:3, 42:7, 43:14, 43:21, 43:23, 45:3, 50:12, 50:16, 50:19 Mogin [23] - 7:6, 9:3, 10:3, 11:8, 20:9, 21:3, 21:17, 23:8, 24:15, 25:8, 27:8, 27:16, 28:11, 36:14, 41:25, 42:17, 42:20, 42:24, 43:14, 43:23, 45:17, 45:23, 50:15 Mogin's [1] - 13:6 moment [2] - 9:16, 10:2 Monday [2] - 21:9, 27:19 Monroe [1] - 3:16 MONTAGUE [1] - 2:2 month [1] - 37:13 months [2] - 6:13, 40:23 most [3] - 4:20, 22:4, 24:17 motion [34] - 4:14, 5:11, 5:15, 5:16, 5:20, 6:3, 6:7, 6:10, 6:12, 6:15, 6:17, 6:24, 7:1, 7:9, 7:21, 8:5, 8:9, 8:24, 9:10, 9:11, 11:6, 11:24, 12:1, 12:19, 13:7, 13:24, 16:25, 17:11, 18:14, 19:10, 24:2, 38:1 motions [7] - 4:11, 5:9, 7:21, 11:10, 11:13, 11:21, 47:22 move [6] - 16:6, 17:5, 17:6, 22:25, 35:15, 48:10 moving [1] - 26:7 MR [125] - 2:2, 2:6, 2:14, 2:17, 3:3, 3:7, 3:11, 3:12, 4:18, 4:23, 5:21, 7:6, 7:13, 7:15, 7:17, 7:19, 8:1, 8:4, 10:4, 11:12, 11:15, 12:4, 12:8, 12:12, 12:20, 12:25,</p>	<p>13:3, 13:22, 16:7, 17:18, 17:25, 18:12, 18:23, 18:25, 19:2, 19:4, 19:6, 19:14, 19:17, 19:18, 19:20, 19:23, 20:6, 20:9, 20:11, 20:15, 21:2, 21:7, 21:11, 21:17, 21:23, 22:1, 22:3, 23:3, 24:10, 25:2, 25:12, 25:20, 25:22, 26:16, 27:5, 27:11, 27:14, 27:22, 28:3, 28:8, 28:15, 28:18, 28:21, 28:23, 30:4, 30:11, 31:19, 32:5, 32:9, 32:13, 33:2, 33:12, 33:14, 33:15, 34:25, 35:5, 35:11, 35:13, 35:21, 35:23, 36:3, 36:14, 36:17, 36:21, 37:4, 37:6, 38:24, 39:12, 39:22, 40:25, 41:3, 41:11, 42:3, 42:7, 42:13, 42:16, 43:14, 43:21, 43:23, 44:8, 44:11, 45:3, 45:16, 45:20, 46:2, 46:5, 46:6, 46:15, 47:6, 47:7, 47:12, 47:16, 48:5, 48:17, 49:8, 50:12, 50:16, 50:19, 51:3 MS [16] - 2:21, 3:15, 5:2, 5:5, 5:17, 6:19, 8:14, 8:20, 9:15, 9:20, 12:15, 45:10, 46:23, 48:1, 50:2, 50:13 mute [1] - 4:19</p>
M		
<p>Madison [2] - 3:3, 3:8 mail [1] - 19:5 main [2] - 8:20, 8:25 major [2] - 26:24, 38:17 margins [1] - 49:16 MARK [1] - 3:12 Mark [3] - 4:18, 12:12, 27:23 Marovitz [5] - 17:8, 32:6, 33:7, 33:20, 42:22 Mary [3] - 23:17, 23:19, 23:22 materials [1] - 20:1 matter [10] - 5:8, 13:23, 14:11, 30:24, 31:2, 31:6, 31:14, 31:24, 39:6, 51:7 MATTHEW [1] - 2:6 Mayer [2] - 4:24, 27:24 MAYER [2] - 2:20, 3:11 McCareins [9] - 3:12, 4:18, 4:23, 12:12, 27:22, 27:23, 51:3 McDERMOTT [1] - 3:15 McKeown [37] - 2:14, 12:4, 19:18, 19:20, 21:18, 22:3, 22:19, 23:3, 24:5, 24:14, 25:2, 25:21, 25:22, 26:13, 26:16, 27:5, 28:3, 28:8, 31:20, 33:5, 34:22, 35:1, 40:1, 41:3, 41:11, 42:22, 45:16, 45:20, 48:5, 48:17, 49:8, 50:25 McKeown's [1] - 33:17 mean [14] - 13:8, 16:16, 18:7, 20:14, 20:23, 24:9, 26:6, 27:4, 33:2, 33:13, 42:1, 45:13, 49:15, 50:9 meaningful [1] - 38:16 means [2] - 16:1, 35:9 meant [1] - 31:22 meet [10] - 4:12, 10:22, 10:23, 11:9, 11:15, 18:9, 23:7, 26:4, 38:16, 50:21 meet-and-confer [1] - 10:23 meeting [3] - 45:2, 48:8, 50:9 MENDEL [1] - 3:3 met [1] - 22:17</p>	<p>method [8] - 17:14, 17:15, 37:24, 37:25, 38:1, 38:9, 38:18, 38:20 methodology [3] - 28:13, 40:14, 44:22 MICHAEL [1] - 3:11 Michael [5] - 27:15, 28:15, 34:25, 44:8, 46:2 Michigan [1] - 2:18 middle [2] - 12:22, 38:13 might [11] - 10:11, 23:6, 23:15, 26:6, 27:1, 28:5, 30:7, 32:25, 40:8, 44:23 Mike [1] - 4:24 MILLER [16] - 2:5, 2:21, 5:2, 5:5, 5:17, 6:19, 8:14, 8:20, 9:15, 9:20, 12:15, 45:10, 46:23, 48:1, 50:2, 50:13 Miller [8] - 5:2, 6:9, 8:15, 9:15, 12:15, 45:9, 46:23, 47:20 Milwaukee [1] - 2:15 minute [6] - 5:12, 6:1, 26:12, 35:19, 35:20, 43:25 minutes [1] - 4:24 misleading [1] - 18:16 missing [1] - 22:17 misspeaking [1] - 25:19 mistaken [1] - 33:8 misunderstanding [2] - 32:22, 33:23 Model [1] - 37:6 MOGIN [41] - 6:23, 7:6, 7:13, 7:15, 7:17, 7:19, 8:1, 8:4, 10:4, 11:12, 11:15, 12:20, 12:25, 13:3, 20:6, 20:9, 20:11, 20:15, 21:7, 21:11, 21:17, 21:23, 22:1, 22:3, 24:10, 25:12, 25:20, 27:11, 36:14, 36:17, 36:21, 37:6, 42:3, 42:7, 43:14, 43:21, 43:23, 45:3, 50:12, 50:16, 50:19 Mogin [23] - 7:6, 9:3, 10:3, 11:8, 20:9, 21:3, 21:17, 23:8, 24:15, 25:8, 27:8, 27:16, 28:11, 36:14, 41:25, 42:17, 42:20, 42:24, 43:14, 43:23, 45:17, 45:23, 50:15 Mogin's [1] - 13:6 moment [2] - 9:16, 10:2 Monday [2] - 21:9, 27:19 Monroe [1] - 3:16 MONTAGUE [1] - 2:2 month [1] - 37:13 months [2] - 6:13, 40:23 most [3] - 4:20, 22:4, 24:17 motion [34] - 4:14, 5:11, 5:15, 5:16, 5:20, 6:3, 6:7, 6:10, 6:12, 6:15, 6:17, 6:24, 7:1, 7:9, 7:21, 8:5, 8:9, 8:24, 9:10, 9:11, 11:6, 11:24, 12:1, 12:19, 13:7, 13:24, 16:25, 17:11, 18:14, 19:10, 24:2, 38:1 motions [7] - 4:11, 5:9, 7:21, 11:10, 11:13, 11:21, 47:22 move [6] - 16:6, 17:5, 17:6, 22:25, 35:15, 48:10 moving [1] - 26:7 MR [125] - 2:2, 2:6, 2:14, 2:17, 3:3, 3:7, 3:11, 3:12, 4:18, 4:23, 5:21, 7:6, 7:13, 7:15, 7:17, 7:19, 8:1, 8:4, 10:4, 11:12, 11:15, 12:4, 12:8, 12:12, 12:20, 12:25,</p>	<p style="text-align: center;">N</p> <p>name [1] - 4:6 namely [1] - 30:24 names [1] - 4:3 narrow [1] - 13:11 NATHAN [1] - 2:17 native [1] - 22:12 nature [1] - 29:23 necessary [3] - 8:7, 11:21, 13:25 need [27] - 5:17, 5:19, 6:6, 6:9, 6:10, 6:13, 6:16, 8:24, 9:5, 9:6, 10:14, 12:5, 13:5, 13:17, 23:2, 27:19, 28:13, 37:20, 38:2, 41:7, 44:4, 45:14, 45:21, 47:1, 49:13, 50:9 needed [6] - 10:6, 14:17, 23:6, 26:2, 48:20, 50:7 Neuwirth [14] - 12:8, 13:22, 17:16, 18:21, 19:12, 20:22, 30:4, 31:17, 32:7, 32:23, 35:5, 36:17, 42:14, 44:4 NEUWIRTH [29] - 3:7, 12:8, 13:22, 17:18, 18:23, 18:25, 19:2, 19:4, 19:6, 19:14, 19:17, 19:23, 21:2, 30:4, 30:11, 31:19, 33:12, 33:15, 35:11, 35:23, 36:3, 37:4, 39:12, 39:22, 40:25, 42:13, 42:16, 46:6, 47:6 Neuwirth's [1] - 37:1 New [2] - 3:8, 47:5 new [11] - 30:20, 31:12, 31:23, 34:14, 35:9, 39:19, 40:5, 40:20, 40:21, 46:13, 46:14 news [1] - 23:13 next [6] - 13:18, 14:23, 24:14, 27:17, 27:19, 41:22 nine [1] - 6:13 nobody [2] - 21:3, 34:14 Nolan [1] - 24:8 Norampac [2] - 3:3, 13:4 normal [1] - 4:20</p>

<p>North [1] - 2:11 Northern [1] - 51:10 nothing [5] - 12:10, 26:21, 31:10, 31:22, 42:11 notice [1] - 45:5 notion [1] - 36:6 number [7] - 11:1, 11:18, 22:18, 35:1, 35:6, 35:8, 49:16 NY [1] - 3:8</p>		
O		
<p>o'clock [3] - 47:4, 47:11, 47:15 oar [1] - 27:11 object [2] - 12:19, 38:10 objection [6] - 8:24, 37:22, 37:24, 39:1, 39:5, 45:20 objections [1] - 29:3 obligated [1] - 30:25 obtain [1] - 14:4 obviously [8] - 6:10, 8:21, 9:23, 15:11, 20:2, 25:25, 35:18, 41:5 occur [1] - 40:19 October [1] - 30:21 Official [1] - 51:9 old [2] - 16:24, 16:25 once [2] - 36:7, 49:23 one [37] - 4:13, 5:7, 6:1, 6:4, 8:18, 9:10, 11:1, 13:3, 16:2, 16:22, 18:4, 18:22, 19:10, 21:12, 21:14, 23:18, 24:14, 26:12, 29:2, 29:6, 33:7, 35:1, 35:6, 35:19, 35:23, 37:19, 41:4, 44:15, 45:5, 45:12, 45:14, 48:5, 48:6, 48:18, 49:9, 50:6 ones [1] - 25:6 open [1] - 4:1 opened [1] - 46:19 opening [1] - 13:14 operate [1] - 42:12 opinion [3] - 29:23, 31:4, 37:10 opposite [1] - 36:12 oppositions [1] - 7:22 oral [2] - 49:1, 49:13 order [9] - 5:12, 5:24, 6:2, 11:2, 13:24, 16:6, 26:10, 26:16, 40:8 ordered [2] - 24:20, 24:21 orders [1] - 4:10 organizational [3] - 15:15, 15:18, 15:21 original [1] - 40:1 originally [3] - 33:17, 34:23, 48:18 ought [1] - 31:13 outside [1] - 18:15 overtly [1] - 15:24</p>	<p>13:23, 14:3, 14:8, 15:13, 15:16, 15:18, 16:10, 16:13, 17:4, 19:24, 46:18 Pacific's [2] - 15:2, 16:12 Packaging [1] - 2:9 page [5] - 8:21, 8:25, 9:1, 26:17, 26:19 pages [1] - 16:23 Paper [3] - 2:14, 12:5, 24:20 paper [4] - 5:24, 16:24, 17:3, 44:4 papers [3] - 7:1, 12:10, 17:1 paperwork [3] - 5:10, 5:11, 5:17 pardon [1] - 19:19 part [5] - 7:7, 10:17, 14:6, 27:9, 37:21 participate [1] - 27:15 participating [1] - 28:1 particular [3] - 5:5, 11:2, 26:11 particularly [6] - 4:4, 7:22, 7:23, 26:20, 42:4, 42:7 parties [4] - 10:21, 11:3, 34:17, 42:17 parties' [1] - 24:18 partner [1] - 4:24 party [1] - 13:3 password [1] - 20:17 PCA [1] - 47:13 PEARSALL [1] - 2:2 people [9] - 4:8, 12:21, 12:25, 15:6, 20:19, 20:23, 26:25, 50:22 per [1] - 5:6 perceived [1] - 33:18 percent [2] - 43:12, 43:18 perfect [2] - 11:8, 43:18 perhaps [4] - 23:9, 42:21, 48:10, 48:22 period [2] - 9:20, 33:4 permission [2] - 5:13, 16:5 person [4] - 10:2, 10:8, 23:10, 50:7 personal [3] - 43:4, 43:25, 44:3 personally [1] - 5:23 phase [1] - 41:18 Philadelphia [1] - 2:3 phone [5] - 4:8, 26:21, 27:13, 35:22, 49:20 phones [1] - 7:13 phonetic [1] - 25:13 physician [1] - 44:1 pick [4] - 4:24, 44:15, 45:12, 45:14 pig [1] - 26:25 pilot [1] - 23:23 place [3] - 8:21, 9:6, 11:16 plaintiff [2] - 48:10, 48:19 Plaintiffs [1] - 2:2 plaintiffs [39] - 4:13, 5:8, 5:19, 6:22, 8:5, 11:3, 11:6, 11:23, 14:1, 14:13, 14:18, 14:22, 15:1, 15:4, 15:17, 15:20, 16:17, 16:19, 22:6, 23:5, 23:8, 25:5, 30:15, 30:17, 31:1, 31:6, 31:11, 31:18, 31:23, 34:12, 35:3, 36:23, 37:1, 37:22, 40:15, 42:10, 46:25, 48:22, 49:17 plaintiffs' [3] - 5:15, 9:10, 11:17 plan [1] - 8:4 plane [1] - 27:24 planning [5] - 10:17, 11:10, 11:12, 30:7, 30:9</p>	<p>plate [1] - 25:9 pleadings [1] - 6:10 plenty [2] - 9:8, 46:8 plow [1] - 10:8 plowing [1] - 18:8 point [13] - 5:7, 20:6, 22:24, 29:8, 29:12, 29:15, 30:5, 30:8, 36:10, 39:17, 40:5, 41:4, 44:11 points [2] - 33:15, 35:5 poor [1] - 47:21 portion [1] - 46:17 position [3] - 29:21, 32:15, 35:18 possibility [1] - 12:23 possible [1] - 20:2 practicable [1] - 19:25 precisely [2] - 22:22, 49:10 preclude [3] - 31:11, 31:22, 33:1 precluded [2] - 37:2, 37:16 predictive [7] - 28:25, 29:18, 32:11, 35:10, 36:8, 36:24, 37:2 prefer [2] - 5:23, 17:5 prepared [3] - 24:25, 31:9, 35:13 prepares [1] - 16:14 presented [4] - 31:5, 34:3, 35:12, 40:10 presenting [1] - 36:4 preserving [1] - 38:10 presume [1] - 35:9 pretty [1] - 10:2 previously [2] - 15:16, 24:25 prints [1] - 26:19 prisoners [1] - 4:5 problem [9] - 5:23, 19:7, 20:12, 20:21, 20:24, 21:8, 21:22, 33:9, 38:7 proceed [1] - 5:22 proceeded [1] - 14:7 proceedings [3] - 4:1, 51:5, 51:7 process [6] - 10:23, 24:23, 39:2, 40:25, 41:20, 42:8 produce [4] - 9:11, 9:12, 46:11, 51:1 produced [10] - 14:8, 19:17, 19:21, 39:2, 39:3, 41:5, 41:6, 41:19, 41:20 producing [2] - 19:16, 33:1 production [16] - 16:22, 17:3, 19:24, 20:15, 24:19, 29:1, 29:8, 29:19, 32:18, 34:8, 35:8, 37:12, 37:23, 38:12, 38:14, 38:17 productions [2] - 32:4, 32:24 program [1] - 23:24 progress [2] - 17:13, 49:5 promptly [1] - 19:25 proposal [7] - 22:8, 22:11, 30:12, 30:14, 31:19, 42:18 propose [1] - 42:17 proposed [3] - 31:1, 40:8, 40:15 proposing [2] - 22:22, 30:18 proprietary [1] - 6:14 propriety [1] - 20:16 protect [1] - 32:14 protection [1] - 33:11 protective [2] - 13:24, 16:6</p>
P		
<p>P.C [1] - 2:2 PA [1] - 2:3 Pacific [15] - 3:7, 12:9, 13:19, 13:21,</p>		

<p>provide [4] - 22:12, 22:14, 22:15, 50:2 provided [1] - 22:16 providing [1] - 22:12 public [2] - 6:5, 6:20 purpose [2] - 33:25, 48:17 purposes [1] - 48:18 pursuit [1] - 14:4 purview [1] - 31:16 put [13] - 12:20, 13:15, 17:4, 20:16, 21:14, 22:13, 23:11, 24:3, 26:12, 29:10, 33:4, 35:1</p>	<p>related [1] - 14:11 relates [1] - 24:14 relatively [1] - 17:3 remand [1] - 39:20 remember [1] - 33:10 remembers [1] - 16:9 render [2] - 14:4, 29:24 replies [4] - 13:16, 48:7, 48:8, 48:11 reply [11] - 6:25, 7:2, 8:11, 18:5, 18:21, 26:10, 47:2, 48:20, 49:6, 49:19 report [3] - 8:6, 14:7, 25:15 reported [2] - 15:8, 15:10 REPORTER [1] - 47:10 Reporter [1] - 51:9 reporter [2] - 47:18, 47:19 reports [1] - 4:12 representative [1] - 16:13 represented [2] - 16:10, 16:17 request [15] - 11:3, 11:5, 21:14, 29:2, 29:8, 30:19, 32:10, 32:17, 35:8, 36:24, 37:12, 39:19, 46:11, 51:1 requested [1] - 22:19 requests [9] - 18:9, 24:19, 30:21, 31:25, 34:8, 34:11, 37:14, 40:12, 40:20 require [1] - 8:9 required [5] - 12:9, 12:16, 29:12, 34:2, 34:6 reservations [1] - 50:11 reserved [3] - 29:3, 50:8, 50:11 resolution [4] - 11:18, 11:19, 12:23, 13:1 resolve [2] - 13:7, 21:15 resolved [2] - 13:21, 13:23 resort [1] - 10:25 resources [1] - 36:3 respect [4] - 20:7, 29:1, 34:17, 37:11 respectfully [1] - 16:5 respond [4] - 11:5, 13:5, 16:7, 47:1 responded [1] - 22:23 response [23] - 5:9, 8:16, 9:14, 9:17, 9:18, 10:10, 10:15, 12:6, 12:9, 12:16, 15:1, 15:4, 15:13, 19:8, 21:18, 22:4, 26:10, 29:1, 29:5, 32:17, 34:8, 36:13, 48:9 responses [8] - 5:9, 8:10, 12:1, 12:3, 13:14, 24:23, 25:3, 25:11 responsibilities [1] - 15:7 responsive [3] - 9:17, 9:18, 34:21 resume [1] - 28:14 retiring [1] - 48:21 review [4] - 8:5, 18:11, 32:11, 33:4 reviewed [3] - 8:8, 32:17, 38:5 revise [2] - 24:21, 24:23 revised [2] - 25:1, 25:2 RFP [1] - 44:23 RFP's [1] - 25:1 rights [1] - 29:3 road [3] - 24:2, 39:24, 40:13 Robert [1] - 5:21 RockTenn [3] - 3:11, 12:12, 27:23 Roland [4] - 23:17, 23:19, 23:22, 24:8</p>	<p>roll [1] - 4:7 rolls [1] - 24:8 round [1] - 37:14 RPR [1] - 51:11 rule [2] - 19:5, 43:8 rules [1] - 15:25 run [2] - 16:22, 21:8</p>
Q		S
<p>questioning [1] - 14:21 questions [6] - 14:10, 14:15, 14:19, 15:6, 15:23, 49:16 quickly [1] - 20:2 QUINN [1] - 3:6 quote [2] - 37:3, 38:6</p> <p style="text-align: center;">R</p> <p>raise [3] - 32:19, 32:20, 37:11 raised [2] - 29:9, 38:1 rather [5] - 7:22, 16:19, 22:12, 48:11, 48:20 re [1] - 33:4 re-review [1] - 33:4 reach [3] - 33:21, 35:13, 44:11 reached [1] - 11:18 react [1] - 39:6 reaction [1] - 38:23 read [2] - 49:2, 49:15 reading [1] - 13:16 ready [4] - 14:13, 20:1, 20:4, 24:3 real [1] - 32:9 really [14] - 6:12, 8:9, 17:4, 18:15, 20:1, 20:24, 24:14, 27:20, 29:22, 30:13, 33:5, 44:11, 47:18, 49:3 reason [3] - 17:4, 35:2, 37:15 reasonable [2] - 33:21, 36:13 reasonably [2] - 9:13, 9:25 reasons [1] - 16:3 receive [2] - 4:15, 5:24 received [4] - 4:13, 5:15, 22:20, 33:7 receiver [1] - 21:24 recent [1] - 22:4 recipients [1] - 15:3 recollection [1] - 7:20 record [4] - 14:9, 18:11, 24:16, 51:7 redacted [2] - 6:5, 6:20 redo [1] - 38:21 refer [1] - 35:7 referral [1] - 4:9 reflects [1] - 42:25 regard [2] - 45:9, 45:10 regarding [3] - 4:14, 28:13, 29:6 reintroduce [1] - 40:14</p>		<p>satisfactory [1] - 31:8 satisfied [1] - 34:9 save [2] - 5:11, 48:24 scanning [1] - 18:1 scenario [2] - 39:17, 39:24 schedule [6] - 5:6, 8:7, 26:8, 28:9, 46:24, 48:23 scheduled [2] - 8:1, 14:3 scheduling [2] - 18:13, 28:6 scope [5] - 4:14, 6:24, 7:20, 9:22, 40:15 SCOTT [1] - 3:3 seal [5] - 5:10, 5:13, 5:16, 6:4, 6:20 search [8] - 28:13, 37:23, 37:24, 37:25, 39:1, 41:8, 41:15, 44:22 searched [2] - 41:7, 41:14 searches [2] - 29:18, 39:9 second [4] - 9:10, 26:19, 29:8, 35:6 secret [2] - 41:25, 42:4 see [17] - 4:11, 8:12, 9:4, 10:15, 20:23, 21:3, 26:13, 28:5, 29:25, 33:2, 33:21, 34:25, 42:18, 44:4, 44:22, 50:1, 50:23 seeking [6] - 5:8, 22:10, 37:2, 37:9, 37:10, 40:20 seem [1] - 24:9 selection [1] - 41:8 send [6] - 37:13, 44:5, 46:8, 47:22, 47:23, 50:23 sense [2] - 24:9, 40:6 sent [8] - 6:25, 22:5, 23:8, 28:24, 31:20, 32:5, 32:6, 33:20 separate [9] - 5:20, 6:2, 6:7, 6:9, 6:10, 6:15, 6:17, 9:24, 27:3 separately [1] - 15:24 September [5] - 13:10, 26:7, 28:14, 48:22, 50:7 series [1] - 17:10 serve [3] - 15:4, 24:25, 36:23 served [4] - 13:20, 15:17, 25:2, 30:21 set [21] - 10:1, 10:2, 10:24, 11:23, 13:8, 13:9, 24:7, 26:10, 26:23, 27:2, 27:20, 28:24, 30:20, 40:11, 45:1, 45:7, 46:3, 46:21, 46:24, 47:3, 49:6 settlement [1] - 43:7 seven [6] - 8:9, 17:17, 17:20, 17:23, 18:21, 48:14 seven-day [1] - 48:14 Seventh [3] - 23:23, 38:12, 39:20 Shadur [1] - 4:9 shall [5] - 11:6, 11:23, 13:16, 24:21,</p>

<p>24:23 short [4] - 18:5, 33:4, 40:9, 49:15 short-term [1] - 40:9 show [1] - 14:9 side [1] - 43:13 sides [2] - 17:15, 34:16 sides' [1] - 43:17 silent [1] - 4:20 similar [1] - 37:14 simpler [1] - 18:4 simply [4] - 5:12, 29:20, 30:2, 32:19 site [1] - 20:16 sitting [1] - 39:8 situation [1] - 8:4 six [1] - 10:21 slight [1] - 7:7 small [3] - 8:22, 13:1, 17:2 SMULIN [1] - 3:15 sorry [7] - 9:12, 27:22, 28:21, 28:23, 33:12, 47:12, 48:14 sort [3] - 8:2, 33:21, 41:18 sound [1] - 29:9 sounded [1] - 21:25 sounds [2] - 18:18, 32:23 source [1] - 50:9 sources [6] - 9:13, 9:20, 9:25, 45:1, 49:2, 50:9 South [3] - 2:6, 2:18, 2:21 speaker [1] - 21:21 speaking [6] - 4:16, 4:17, 7:6, 21:23, 32:7, 33:8 speaks [2] - 35:24, 36:17 specific [12] - 8:9, 8:10, 8:17, 8:22, 16:17, 17:10, 22:14, 31:18, 34:2, 34:6, 49:3, 49:14 specifically [3] - 14:7, 31:4, 38:25 specifics [1] - 10:7 spent [1] - 41:2 spoken [1] - 13:3 Sprung [1] - 25:25 sprung [7] - 26:4, 26:21, 26:22, 27:4, 27:9, 27:18, 44:25 stages [1] - 24:19 STAHL [1] - 2:17 standards [2] - 31:8, 34:9 start [6] - 26:8, 27:21, 35:17, 36:9, 47:8, 47:15 started [1] - 28:12 starts [2] - 26:17 state [1] - 36:25 statements [1] - 42:20 status [14] - 4:10, 7:3, 9:6, 10:1, 10:2, 10:16, 13:25, 19:16, 22:6, 23:10, 25:4, 26:14, 45:25, 50:7 STEPHEN [1] - 3:7 Steve [3] - 12:8, 13:22, 30:4 sticking [1] - 45:4 still [16] - 10:22, 12:3, 12:22, 13:7, 14:12, 14:22, 22:6, 25:7, 26:4, 44:16, 45:7, 46:20, 49:25, 50:5, 50:7 stipulation [17] - 28:12, 28:23, 30:1,</p>	<p>30:23, 31:10, 31:22, 32:14, 34:4, 35:7, 35:14, 36:10, 36:11, 37:20, 37:21, 41:19, 43:7, 43:10 stone [1] - 23:20 stop [1] - 32:2 stops [1] - 38:2 STRAWN [1] - 3:11 Street [5] - 2:3, 2:6, 2:11, 3:3, 3:16 strikes [1] - 23:6 struck [1] - 40:18 structured [1] - 15:23 study [1] - 26:3 stuff [1] - 18:18 subject [7] - 14:11, 30:24, 31:2, 31:6, 31:14, 31:24, 34:15 submission [3] - 8:18, 9:1, 9:21 submissions [1] - 8:22 submitted [1] - 33:5 subsequent [2] - 31:14 subsequently [1] - 32:13 substance [2] - 31:21, 43:1 substantial [1] - 14:12 sufficiency [1] - 25:10 suggest [5] - 12:22, 26:6, 27:15, 31:17, 36:8 suggested [3] - 14:1, 28:4, 47:11 suggesting [5] - 31:11, 31:23, 40:4, 48:13, 49:6 suggestion [2] - 42:13, 48:15 Suite [4] - 2:7, 2:18, 3:3, 3:16 suits [1] - 28:9 SULLIVAN [1] - 3:7 summarized [1] - 17:8 suppose [1] - 38:12 supposed [1] - 22:14 surprised [1] - 25:16 survive [1] - 35:2 switch [1] - 29:20 system [1] - 47:19 systems [2] - 49:4, 49:17</p>	<p>THE [122] - 4:2, 4:22, 5:1, 5:4, 5:14, 5:19, 6:1, 6:4, 6:6, 6:8, 6:9, 6:21, 6:24, 7:11, 7:14, 7:16, 7:18, 7:25, 8:3, 8:8, 8:19, 9:2, 9:19, 9:22, 10:6, 11:14, 11:22, 12:7, 12:14, 12:18, 12:24, 13:2, 13:6, 17:8, 17:19, 17:22, 17:23, 18:3, 18:18, 18:24, 19:1, 19:3, 19:5, 19:9, 19:15, 19:19, 19:22, 20:5, 20:8, 20:10, 20:14, 20:22, 21:6, 21:8, 21:12, 21:20, 21:25, 22:2, 23:2, 23:12, 24:11, 25:8, 25:18, 25:21, 26:11, 26:20, 27:6, 27:12, 27:17, 28:1, 28:7, 28:10, 28:17, 28:19, 28:22, 30:9, 31:17, 32:2, 32:8, 32:12, 32:21, 35:4, 35:19, 36:2, 36:16, 36:20, 37:17, 38:25, 39:21, 40:24, 41:10, 41:17, 42:6, 42:15, 43:2, 43:15, 43:22, 44:3, 44:10, 44:14, 45:4, 45:12, 45:19, 45:21, 46:4, 46:7, 46:16, 47:3, 47:9, 47:10, 47:11, 47:14, 47:17, 48:3, 48:13, 48:25, 49:11, 50:4, 50:14, 50:17, 50:20, 51:4 therefore [1] - 10:24 thoughts [1] - 27:1 three [5] - 23:24, 25:3, 26:18, 35:1, 40:12 threw [2] - 20:20, 39:9 throughout [2] - 16:10, 16:15 throwing [1] - 49:24 Thursday [1] - 45:6 TINE [1] - 2:6 titles [2] - 15:9, 15:10 today [11] - 4:25, 5:15, 13:15, 17:1, 19:18, 19:20, 25:14, 26:14, 47:20, 49:2, 49:15 today's [2] - 20:3, 43:1 together [4] - 13:19, 17:4, 22:20, 42:18 tomorrow [13] - 4:15, 5:6, 8:12, 9:4, 9:14, 11:10, 11:13, 11:25, 13:7, 25:17, 28:5, 46:25, 48:9 ton [1] - 25:8 top [1] - 49:21 topic [1] - 23:9 topics [2] - 14:11, 23:8 totally [1] - 18:16 touch [1] - 4:11 track [2] - 4:12, 47:21 transactional [3] - 21:13, 23:4, 24:6 transcript [1] - 51:7 transmitted [2] - 33:17, 34:23 treating [1] - 6:18 tremendous [1] - 16:3 tremendously [1] - 35:16 tried [1] - 40:18 triggered [2] - 40:12, 40:13 trip [4] - 21:19, 22:5, 28:2, 50:20 trouble [1] - 20:11 true [2] - 18:16, 30:18 truly [1] - 20:21 try [14] - 7:15, 15:14, 20:25, 23:7, 33:21, 38:17, 42:25, 43:6, 43:16, 43:18, 44:18, 47:17, 49:3, 49:25</p>
	T	
	<p>taping [1] - 47:19 technical [1] - 20:19 technologies [2] - 34:2, 34:6 technology [14] - 30:17, 31:1, 31:5, 31:24, 34:15, 34:19, 35:9, 36:25, 37:3, 37:5, 37:7, 37:16, 40:4, 40:21 telephone [4] - 4:2, 4:9, 9:6, 45:24 telephonic [3] - 25:4, 26:2, 28:6 Temple [5] - 2:21, 5:3, 8:15, 9:16, 12:15 Temple-Inland [5] - 2:21, 5:3, 8:15, 9:16, 12:15 temporal [4] - 4:14, 6:24, 7:20, 9:22 tend [1] - 36:18 term [1] - 40:9 terms [5] - 7:10, 16:23, 25:6, 36:17, 41:9</p>	

<p>trying ^[11] - 7:19, 10:7, 17:14, 19:11, 20:2, 39:13, 43:15, 46:21, 47:21, 47:24</p> <p>Tuesday ^[8] - 17:18, 17:19, 17:20, 17:21, 45:8, 45:22, 46:4, 47:3</p> <p>turn ^[2] - 27:24, 44:25</p> <p>turned ^[1] - 21:3</p> <p>turning ^[1] - 20:25</p> <p>tweak ^[1] - 44:6</p> <p>two ^[14] - 4:10, 5:9, 10:19, 16:22, 21:8, 22:15, 26:10, 26:20, 29:5, 33:15, 35:5, 35:8, 44:15</p> <p>two-week ^[2] - 26:10</p> <p>type ^[3] - 30:17, 30:25, 31:10</p> <p>types ^[1] - 15:21</p> <p>typically ^[1] - 8:14</p>	<p>week ^[9] - 11:16, 22:16, 25:6, 25:24, 26:10, 27:18, 48:24, 50:14</p> <p>weeks ^[2] - 24:6, 26:20</p> <p>West ^[3] - 3:3, 3:12, 3:16</p> <p>wheels ^[1] - 40:3</p> <p>whole ^[5] - 14:5, 18:6, 18:11, 23:23, 36:10</p> <p>wholly ^[1] - 15:12</p> <p>WI ^[1] - 2:15</p> <p>WILL ^[1] - 3:15</p> <p>wind ^[1] - 48:4</p> <p>WINSTON ^[1] - 3:11</p> <p>Wisconsin ^[1] - 2:14</p> <p>wise ^[1] - 41:24</p> <p>wisely ^[1] - 10:2</p> <p>withdraw ^[2] - 14:17, 37:22</p> <p>withdrawing ^[3] - 37:24, 38:25, 39:5</p> <p>withdrawn ^[1] - 14:24</p> <p>witness ^[3] - 14:8, 14:14, 14:19</p> <p>witnesses ^[1] - 36:5</p> <p>wonder ^[1] - 20:11</p> <p>wonderful ^[2] - 9:6, 50:20</p> <p>wondering ^[1] - 20:20</p> <p>word ^[1] - 39:16</p> <p>words ^[2] - 31:21, 39:10</p> <p>world ^[1] - 16:24</p> <p>worry ^[3] - 9:7, 9:8, 50:21</p> <p>worth ^[1] - 16:23</p> <p>WOZNIAK ^[1] - 5:21</p> <p>Wozniak ^[3] - 5:21, 11:9, 44:5</p> <p>write ^[1] - 47:24</p> <p>writing ^[2] - 15:20, 49:12</p> <p>written ^[1] - 23:20</p>
U	Y
<p>unable ^[2] - 20:19, 22:10</p> <p>under ^[7] - 5:10, 5:13, 5:16, 6:4, 6:20, 31:8, 37:1</p> <p>understood ^[3] - 31:2, 32:15, 33:24</p> <p>undertaken ^[1] - 32:1</p> <p>undertaking ^[1] - 37:10</p> <p>unexpected ^[1] - 12:10</p> <p>unfortunately ^[2] - 13:24, 22:16</p> <p>unique ^[2] - 20:13, 20:21</p> <p>unless ^[1] - 32:21</p> <p>unnecessary ^[2] - 14:5, 23:16</p> <p>unquote ^[1] - 38:6</p> <p>up ^[20] - 4:24, 11:23, 13:3, 15:14, 16:5, 16:9, 17:10, 22:11, 26:4, 26:23, 27:20, 32:15, 36:7, 38:9, 39:8, 40:18, 42:18, 42:25, 48:4, 48:10</p> <p>upcoming ^[1] - 14:2</p> <p>update ^[1] - 26:14</p> <p>updated ^[1] - 23:12</p> <p>urgent ^[2] - 43:25, 44:3</p> <p>URQUHART ^[1] - 3:6</p> <p>useful ^[1] - 46:3</p>	<p>year ^[3] - 38:4, 41:22, 42:1</p> <p>years ^[11] - 15:8, 15:9, 15:10, 23:24, 36:23, 36:24, 38:11, 39:22, 40:12, 41:13, 41:15</p> <p>yesterday ^[5] - 19:20, 19:25, 20:3, 22:6, 23:9</p> <p>York ^[2] - 3:8, 47:5</p>
V	Z
<p>vacations ^[1] - 23:15</p> <p>VAN ^[1] - 2:6</p> <p>variations ^[1] - 29:5</p> <p>various ^[1] - 11:17</p> <p>version ^[3] - 6:5, 6:20</p> <p>video ^[2] - 4:4, 4:5</p> <p>violates ^[1] - 15:24</p> <p>voluntary ^[1] - 15:2</p>	<p>zero ^[5] - 35:17, 35:24, 36:9, 36:11, 41:1</p>
W	
<p>Wacker ^[2] - 2:21, 3:12</p> <p>wait ^[3] - 28:19, 48:21</p> <p>wants ^[1] - 24:11</p> <p>Wayerhaeuser ^[1] - 3:15</p> <p>Wednesday ^[4] - 45:8, 45:19, 45:22</p>	